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Research Paper

# TARGET LISTS: A 1923 IDEA WITH APPLICATIONS FOR THE FUTURE

MAJOR HERMAN REINHOLD\*

NEW YORK TIMES, December 19, 2002, Page 1A:  
CLINTON INDICTED FOR HUMANITARIAN CRIMES  
AMSTERDAM, Netherlands - President Clinton was indicted today by the International Criminal Court for the 1998 missile attack on a Sudan medicine factory. If convicted of crimes against humanity, he faces life in prison. President Bush's recent conviction for the Baghdad air raid shelter bombing...

Will United States officials be indicted, tried and convicted for bombing raids? The international legal community is continually developing the concepts of crimes against humanity, war crimes and command responsibility for these crimes. In the future, these crimes could be tried in the proposed International Criminal Court.<sup>1</sup> U.S. target selection is often controversial. The hypothetical news story has just two incidents when national and world media

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<sup>1</sup> See Marcella David, *Grotius Repudiated: The American Objections To The International Criminal Court and The Commitment to International Law*, 20 MICH. J. INT'L L. at 337 (Winter 1999). Pres. Clinton signed the war crimes tribunal treaty on Dec. 31, 2000, with concerns about treaty flaws. See Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal*, WASH. POST, Jan. 1, 2001, at A1. See treaty at [www.un.org/law/icc/statute/99\\_corr/cstatute.htm](http://www.un.org/law/icc/statute/99_corr/cstatute.htm) (last visited Feb. 9, 2001). For analysis of the proposed court, see the Mar. 2001 MILITARY LAW REVIEW, with articles by Ambassador David C. Scheffer, Lieutenant Colonel Michael A. Newton and Major Michael L. Smidt. This paper focuses on the legality of targets under international law. Whether a target is best politically, strategically, operationally, tactically, morally, or for public relations purposes are different but related subjects.

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criticized U.S. target selection.<sup>2</sup> However, the U.S. is often criticized for selecting some bombing targets and for not selecting other targets.<sup>3</sup>

Is there a way for the U.S. and other nations to select targets to minimize criticism? What if nations agreed on target lists in advance? Would such a list have other benefits? This article proposes the U.S. and other nations adopt a uniform target list as guidance for future bombing. A general target list, accepted in advance of any conflict, would limit criticism and build consensus in the international community that certain targets are appropriate. Such a consensus would make coalition military operations more efficient and build stronger coalitions for international actions. In particular, this article discusses the target list in Article 24(2) of the proposed Hague Rules of Air Warfare of 1923.<sup>4</sup> This article also discusses the guidance of Articles 22 to 24 of those rules.

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<sup>2</sup> For criticism of the Sudan attack, see: Tim Weiner & Steven Lee Myers, *After The Attacks: The Overview; Flaws in U.S. Account Raise Questions on Strike in Sudan*, N.Y. TIMES, Aug. 29, 1998, at A1; David Hirst, *U.S. Missile Raids: Factory Rubble Yields No Sign of Arms*, GUARDIAN (London), Aug. 24, 1998, at 2. For criticism of the Baghdad attack, see: KENNETH L. VAUX, *ETHICS AND THE GULF WAR*, at 28-31 (1992); HUMAN RIGHTS WATCH, *NEEDLESS DEATHS IN THE GULF WAR*, at 6-8, 128 (1991); RAMSEY CLARK, *THE FIRE THIS TIME*, 70-72, 83, 180 (1992); and, *Tragedy in Baghdad; 500 Killed In Shelter, Iraq Says; U.S. Calls Target Military; Highest Toll of Civilians in Gulf War*, L.A. TIMES, Feb. 13, 1991, at P1.

<sup>3</sup> For criticism of World War II bombing see JOHN BUCKLEY, *AIR POWER IN THE AGE OF TOTAL WAR*, at 163 (1999); HIROSHIMA'S SHADOW (Kai Bird & Lawrence Lifschultz eds., 1998); HOITO EDOIN, *THE NIGHT TOKYO BURNED* (1987); Chris af Jochnick & Roger Normand, *The Legitimization of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J., Winter 1994, at 86-90; Simon Jenkins, *Dresden: Time To Say We're Sorry*, WALL STREET J., Feb. 14, 1995. After the Korean War, critics felt properly used air power could have won the war. EARL H. TILFORD, JR., *SETUP: WHAT THE AIR FORCE DID IN VIETNAM AND WHY*, at 18-21 (1991). During and since the Vietnam War, there has been controversy over what was or was not bombed and the entire targeting process. See TILFORD, *supra*, at 75, 79, 82, 89, 109; Telford Taylor, *Defining War Crimes*, N.Y. TIMES, Jan. 11, 1973, at 39; W. Hays Parks, *Rules of Engagement: No More Vietnams*, PROCEEDINGS, Mar. 1991, at 27-28; Lt Col John G. Humphries, *Operations Law and the Rules of Engagement in Operations Desert Shield and Desert Storm*, AIRPOWER J., Vol. VI, No. 3, at 15 (Fall 1992); Christopher Hitchens, *The Case Against Henry Kissinger Part I: The Making of a War Criminal*, HARPER'S MAGAZINE, Feb. 2001, at 42-53. For criticism of U.S. incendiary bomb use in World War II, Korea and Vietnam, see: STOCKHOLM INT'L PEACE RESEARCH INSTITUTE, *INCENDIARY WEAPONS*, at 30-63, (1975) [hereinafter SIPRI]. For criticism of the Gulf War, see CLARK, *supra* note 2; HUMAN RIGHTS WATCH, *supra* note 2. For criticism of Kosovo bombing, see Amnesty International's June 6, 2001 report 'COLLATERAL DAMAGE' OR UNLAWFUL KILLINGS? VIOLATIONS OF THE LAW OF WAR BY NATO DURING OPERATION ALLIED FORCE, available at [www.amnesty.org](http://www.amnesty.org), which says, "...whatever their intentions -- NATO forces did commit serious violations of the laws of war leading...to the unlawful killings of civilians." [hereinafter AI Report].

<sup>4</sup> See Hague Rules of Air Warfare Drafted by A Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, [hereinafter 1923 Air Rules], *reprinted in*, THE LAWS OF ARMED CONFLICTS, at 207 (Dietrich Schindler & Jiri Toman eds., 1988). See Appendix for Art.s 22-24.

## I. INTRODUCTION

Almost since the inception of aerial bombing, critics have focused on target selection and criticized in different ways. General criticisms include: the bombing of inappropriate or illegal targets; causing environmental damage; and, the "excessive use of force" with nuclear weapons or firebombing. In Kosovo operations, NATO was criticized for striking several targets, including: vehicle convoys with civilians; passenger trains with civilians; a Serbian radio and TV station; the Chinese Embassy; factories and refineries; and, a village.<sup>5</sup> Amnesty International, Yugoslavia and others accused the NATO nations of war crimes because of the Kosovo bombing campaign.<sup>6</sup> Criticisms of some of these strikes led to the establishment of a committee to assess allegations against NATO and report to the Prosecutor of the International Criminal Tribunal for Yugoslavia.<sup>7</sup>

NATO strikes in Yugoslavia reminded people of other wars while highlighting the possible environmental harm to the region.<sup>8</sup> The damage brought to mind the oil spills and fires in the Gulf War<sup>9</sup> and use of defoliants in the Vietnam War.<sup>10</sup> NATO strikes resulted in oil and poisons polluting the Danube, killing fish and carrying toxins to Romania and Bulgaria.<sup>11</sup> Greek au-

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<sup>5</sup> See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, available at [www.un.org/icty/pressreal/nato061300.htm](http://www.un.org/icty/pressreal/nato061300.htm) (last visited Feb. 9, 2001) [hereinafter *Final Report*]. The report was written for the Prosecutor of the International Criminal Tribunal for Yugoslavia and said no further investigation was needed because "either the law is not sufficiently clear or investigations are unlikely to result in" enough evidence to support charges.

<sup>6</sup> See AI Report, *supra* note 3; Federal Republic of Yugoslavia website at [www.gov.yu](http://www.gov.yu), "Agression Against FRY," "Appeals," then, "03.06.1999," or "27.05.1999" (last visited Feb. 12, 2001); *Kosovo: Is NATO Guilty of War Crimes?*, BBC News at [news.bbc.co.uk/1/hi/english/talking\\_point/newsid\\_781000/781165.stm](http://news.bbc.co.uk/1/hi/english/talking_point/newsid_781000/781165.stm). (last visited Feb. 9, 2001). The BBC News site has comments from over 30 people from ten different nations. Some supported NATO's actions in Kosovo, while others felt NATO was guilty of war crimes.

<sup>7</sup> See *Final Report*, *supra* note 5.

<sup>8</sup> See Ida L. Bostian, *Hazardous Materials and Energy: The Environmental Consequences of the Kosovo Conflict and the NATO Bombing of Serbia*, 1999 COLO. J. INT'L L. & POL'Y 230 (at 230). See also Aaron Schwabach, *Environmental Damage Resulting from the NATO Action Against Yugoslavia*, 25 COLUM. J. ENVTL. L. 117 (2000)(at 117). For the Yugoslavian government's perspective, go to [www.gov.yu](http://www.gov.yu), then "Aggression Against FRY" for 40 pages of details on damage to nature areas, pollution, environmental damage, and allegations of NATO war crimes (last visited Feb. 12, 2001).

<sup>9</sup> See VAUX, *supra* note 2, at 27, 75, 147.

<sup>10</sup> See Bostian, *supra* note 8, at 2. See also Joseph B. Verrenga & Tini Tran, *Agent Orange's Child Victims Suffering*, Nov. 14, 2000, at [aol.com](http://aol.com) (printed Nov. 14, 2000). The U.S. used 20 million gallons of defoliants in Vietnam from 1962 to 1971. About a million Vietnamese are affected by exposure, including 150,000 children.

<sup>11</sup> See Bostian, *supra* note 8, at 3.

thorities were concerned fires in refineries, fertilizer and explosives plants would send them airborne toxins.<sup>12</sup>

Criticism of U.S. bombing from previous wars is often found in the news.<sup>13</sup> The atomic bomb and firebombing of Japan create strong emotions and long painful memories. When the National Air and Space Museum, part of Washington D. C.'s Smithsonian Museum, planned an exhibit of the Enola Gay in 1995, they received over 30,000 pieces of angry mail, causing the Museum Director to resign and the Senate to hold hearings.<sup>14</sup>

Many remembered the bombing of Dresden and German cities when a statue honored Sir "Bomber" Harris in 1992.<sup>15</sup> In October 1992, when the Queen of England visited Dresden, protestors booed and threw eggs.<sup>16</sup> Others remember Hiroshima and Nagasaki as peace protestors use those anniversaries to protest nuclear weapons, the military, or both.<sup>17</sup>

Criticism of bombing is also found in popular literature and films. The book, *Slaughterhouse-Five*, by Kurt Vonnegut, told of the Dresden bombing and was made into a movie. Joseph Heller's book, *Catch-22*, also made into a film, tells the war experiences of a bombardier with dark humor and satire. The recent film *Three Kings* criticized Gulf War bombing by highlighting the death and injury of civilians and the destruction of the businesses of anti-Hussein rebels.<sup>18</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> See Bob Thompson, *The Museum of the American Century*, WASH. POST, Sept. 17, 2000, Magazine at 8; Peter Millar, *A Royal Header in the Heart of Europe*, TIMES (London), Oct. 25, 1992, Features.

<sup>14</sup> The Enola Gay, a B-29 bomber, dropped the atomic bomb on Hiroshima in 1945. See Joel Achenbach, *Enola Gay Exhibit*, WASH. POST, June 28, 1995, at A1; Jacqueline Trescott, *Senator Warns Smithsonian on Controversies*, WASH. POST, May 19, 1995, at D6. The controversy continues, see John T. Correll, *Strange Stories about Enola Gay: They Just Keep Coming*, A.F. MAGAZINE, Nov. 2000, at 16.

<sup>15</sup> Harris was head of Britain's Bomber Command in World War II, from 1942 to 1945 and is "responsible" for the "strategic bombing" of German cities. DUDLEY SAWARD, *BOMBER HARRIS*, at 116. For reports on the statue, see Anne McElvoy, *This is the Real Memorial*, TIMES (London), May 26, 1992, Features; Roger Boyes, *Anniversary of Bombing Opens "War Crime" Wound*, TIMES (London) Feb. 11, 1995, Overseas News. Boyes reports Harris is considered "a war criminal" in Dresden. In a Feb. 15, 1995 editorial, Simon Jenkins called firebombing, such as Dresden, "airborne terrorism" that should be banned. Simon Jenkins, *Ban Airborne Terrorism*, TIMES (London), Feb. 15, 1995, Features.

<sup>16</sup> See Millar, *supra* note 13; photo of the demonstration, TIMES (London) Oct. 23, 1992.

<sup>17</sup> From 1987 to 1989, I was a Judge Advocate and Special Assistant U.S. Attorney at Griffiss Air Force Base, Rome, N.Y. Peace protestors would march and trespass there on Hiroshima Day, and be tried in U.S. Magistrate's Court in Syracuse. I observed and prosecuted. The protests predated my service by several years.

<sup>18</sup> See KURT VONNEGUT, JR., *SLAUGHTERHOUSE-FIVE* (1969); *SLAUGHTERHOUSE-FIVE* (Universal Pictures, 1972); JOSEPH HELLER, *CATCH-22* (1955); *CATCH-22* (Paramount Pictures, 1970); *THREE KINGS* (Warner Brothers, 1999).

Perhaps there is a way to reduce criticism of U.S. bombing and work consistently and effectively with our allies within the Law of War. This article will show the development of the Law of War through conventions and the practice and customs of nations. Conventions, treaties and comments by national leaders illustrate international law. However, U.S. actions in wartime show real world applications of the Law of War. Through time, the actions and customs of nations can become accepted international law standards or "opinio juris." Acts by nations at war also show how practice in warfare often conflicts with the pronouncements of national leaders. This article will show the Law of War in both word and deed.<sup>19</sup> The article will also discuss the 1923 Air Rules, why the U.S. should adopt them, and how they contrast with the status quo of U.S. targeting. Adoption of the 1923 Air Rules by the U.S. and others would be a significant advance in the Law of War that could limit criticism while building consensus in NATO for future operations. In the alternative, the U.S. and NATO could adopt the 1923 Air Rules as a basis for NATO or coalition operations as a matter of policy, while trying to maintain the flexibility of the status quo.

## II. BACKGROUND

### A. Preliminary History and General Principles of the Law of War

When the airplane was invented, the Law of War (or the *jus in bello*) was already in place. It has been shaped from ancient times through endless conflicts.<sup>20</sup> Like other parts of international law, the Law of War is both created and evidenced by international treaties, court decisions, and the custom or actions of nations.<sup>21</sup>

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<sup>19</sup> The U. S. Department of Defense and Army use the term "Law of War" while the Air Force and Navy say "Law of Armed Conflict" (or "LOAC"). See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 5810.01, IMPLEMENTATION OF THE DEPT OF DEFENSE LAW OF WAR PROGRAM (12 Aug. 1996); INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 2001, Chapter 2; OPNAV INSTRUCTION 3300.52, LAW OF ARMED CONFLICT (LAW OF WAR) PROGRAM TO ENSURE COMPLIANCE BY THE U.S. NAVY AND NAVAL RESERVE (18 Mar. 1983). The International Committee of the Red Cross (ICRC) uses "International Humanitarian Law" in its publications. See ICRC SELECTED PUBLICATIONS, at 46, (1997). See also [www.icrc.org](http://www.icrc.org) then "English" (last visited Feb 9, 2001).

<sup>20</sup> See A. P. V. ROGERS, LAW ON THE BATTLEFIELD, at 1-3 (1996); HILAIRE MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW, 8-17 (2d ed. 1998); HUMAN RIGHTS WATCH, *supra* note 2, at 28; Jochnick & Normand, *supra* note 3, at 52-55.

<sup>21</sup> See *The Paquete Habana*: *The Lola*, 175 U.S. 677 (1900); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (1980); ROGERS, *supra* note 20, at 1; U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, paras. 4-8 (July 1956).



The modern era of the Law of War began in the 1860s in the U. S. and Europe.<sup>22</sup> During the U. S. Civil War, Professor Lieber of Columbia College wrote a code of conduct for Union troops that may be considered a "restatement" of the laws and customs in effect at the time.<sup>23</sup> When the Union Army adopted the Lieber Code, it was the "first modern codification of the laws of war to be officially adopted by a warring belligerent."<sup>24</sup> Subsequently, in Geneva, Switzerland, the International Committee of the Red Cross (ICRC), founded in 1863, issued a convention for protection of the wounded in 1864.<sup>25</sup>

From the 1860's, the Law of War developed in two directions: The Hague Law and the Geneva Law. However, these sets of laws have much in common. The Hague Law primarily refers to a series of conventions, two of the most important being the conventions of 1899 (Hague II) and 1907 (Hague IV) on Laws and Customs of War on Land.<sup>26</sup> The Geneva Law starts with the documents of 1863 and 1864, and then continues with other treaties relating to the wounded, in 1868, the wounded and sick, in 1906 and 1929, and Prisoners of War, in 1929. The most recent conventions are the four Geneva Conventions of 1949 and the two Protocols of 1977.<sup>27</sup> The Hague Law and Geneva Law are related, but they have some basic distinctions.<sup>28</sup>

<sup>22</sup> See MCCOUBREY, *supra* note 20, at 17; Steven Keeva, *The Law of War*, 77 ABA J., Dec. 1991, at 55; W. Hays Parks, *Air War and The Law of War*, 32 A.F.L. REV. 1, at 7, 1990.

<sup>23</sup> See Instructions For The Government of Armies of the U. S. in the Field, Prepared by Francis Lieber, issued as Gen. Orders No. 100 by Pres. Lincoln, Apr. 24, 1863, *reprinted in* Schindler & Toman, *supra* note 4, at 3-23 [hereinafter The Lieber Code]. Lieber taught law and was a Doctor of Philosophy. He served with the Prussian army in the 1815 Battle of Waterloo. Two of his sons fought for the U. S. and one was a Confederate soldier. The Code has 157 Art.s in ten sections and was given to both U. S. and Confederate troops in the war. The code refers to the "law of war" or "usages of war" (Art.s 11, 13-14, 27, 33, 52, 60, 90 and 148) and says the law of war has advanced in civilized nations (Art.s 22-30). MCCOUBREY, *supra* note 20, at 18; Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War*, A.F.L. REV., 1994, at 46, n.27; Parks, *supra* note 22, at 7-8; Jochnick & Normand, *supra* note 3, at 65-66.

<sup>24</sup> See Jochnick & Normand, *supra* note 3, at 65.

<sup>25</sup> See MCCOUBREY, *supra* note 20, at 17; Keeva, *supra* note 22; Resolutions of the Geneva Int'l Conference, Oct. 26-29 1863, and, Convention for the Amelioration of the Condition of the Wounded Armies in the Field, Geneva, Aug. 22 1864, *reprinted in* Schindler & Toman, *supra* note 4, at 275.

<sup>26</sup> See Convention (II) With Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, and, Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907 [hereinafter Hague II and IV], both *reprinted in* Schindler & Toman, *supra* note 4, at 63-98.

<sup>27</sup> See Additional Art.s relating to the Condition of the Wounded in the Field, Geneva, Oct. 20, 1868, Convention For The Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 6, 1906, Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 27, 1929, Convention Relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, Aug. 12, 1949, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked

The Hague Law focuses on the conduct of warfare; the means and methods of war, types and use of weapons, and tactics during hostilities.<sup>29</sup> The Geneva Law focuses on protecting and aiding war victims.<sup>30</sup> The four 1949 Geneva Conventions embody the lessons of World War II, with a focus on victims and preventing suffering.<sup>31</sup> The most recent conventions protect the wounded, sick, shipwrecked, prisoners of war, and civilians.<sup>32</sup>

Certain key concepts are expressed in the Law of War by both tradition and the treaty laws of The Hague and Geneva. The related concepts overlap in rules and ideals. The concepts are military necessity, humanity, distinction or discrimination, and proportionality.<sup>33</sup>

The Lieber Code defines military necessity as "...those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of law."<sup>34</sup> Soldiers should not kill or destroy in an orgy of plunder or revenge or hatred. Military actions of soldiers must be "demanded by the necessities of war."<sup>35</sup> While soldiers must win wars, all acts are not allowed. They must be guided by the principle of humanity, also called the prohibition against unnecessary suffering.<sup>36</sup> The purpose section of Hague IV explains that even in war we must serve "the interests of humanity" and both "belligerents and inhabitants" are protected by the "law of nations" resulting from the customs of civilized people, and "dictates of the public conscience."<sup>37</sup>

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Members of Armed Forces at Sea, Geneva, Aug 12, 1949, Convention (III) Relative to the Treatment of Prisoners of War, Geneva, Aug. 12, 1949, Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, Aug. 12, 1949 [hereinafter Geneva I, II, III and IV], Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, June 8, 1977, and Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 8 June 1977 [hereinafter Protocol I and II], all *reprinted in* Schindler & Toman, *supra* note 4, at 275.

<sup>28</sup> See MCCOUBREY, *supra* note 20, at 2.

<sup>29</sup> See Jochnick & Normand, *supra* note 3, at 52.

<sup>30</sup> *Id.*

<sup>31</sup> See Schwabach, *supra* note 8, at 125.

<sup>32</sup> See Geneva I, II, III, and IV, *reprinted in* Schindler & Toman, *supra* note 4, at 373.

<sup>33</sup> See ROGERS, *supra* note 20, at 3; Stephen A. Myrow, *Waging War on the Advice of Counsel*, 7 USAFA J. LEG. STUD. 131, 1996/1997, at 132.

<sup>34</sup> See The Lieber Code, Art. 14, *reprinted in* Schindler & Toman, *supra* note 4, at 6.

<sup>35</sup> See ROGERS, *supra* note 20, at 6; The Lieber Code, Art.s 15 and 16, *reprinted in* Schindler & Toman, *supra* note 4, at 6.

<sup>36</sup> See DeSaussure, *supra* note 23, at 46.

<sup>37</sup> See Hague IV, *reprinted in* Schindler & Toman, *supra* note 4, at 69-70. "Humanity" is well established in the Lieber Code. Art. 16 bans unnecessary suffering and says "Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in a fight, nor of torture to extract confessions." See The Lieber Code, Art.s 11, 16, 22-25, 44, 53, 56 and 76 for humanity, and Art.s 15-16 and 37 for chivalry, *reprinted in* Schindler & Toman, at 5-13. "Humanity" is related to "chivalry."

The rules of military necessity and humanity intersect to create the concept of distinction or discrimination.<sup>38</sup> If soldiers may only take actions to further the war and may not cause unnecessary suffering, then they must know their targets whenever possible.<sup>39</sup> Soldiers should fight soldiers. Non-combatants may never be intentionally killed or wounded.<sup>40</sup> Civilian property, cultural property, historical buildings, hospitals, and churches should not be intentionally destroyed unless there is a valid military purpose.<sup>41</sup>

The concept of proportionality is a balance between a soldier's mission and their duty not to cause unnecessary suffering.<sup>42</sup> Proportionality means

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See Art. 23 of Hague IV; ROGERS, *supra* note 20 at 3. Chivalry requires "...humanitarian safeguards not be subverted by a belligerent to effect purely military goals." DeSaussure, *supra* note 23, at 47. Art. 16 of the Lieber Code covers chivalry and says "...in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult." The Lieber Code, Art. 16, *reprinted* in Schindler & Toman, at 6. Chivalry is seldom key in bombing and will not be discussed further.

<sup>38</sup> The Lieber Code has distinction in Arts 19 (commanders should let noncombatants...leave before a bombardment), 22 ("...the unarmed citizen is to be spared...as much as the exigencies of war will permit."), 25, and, 35 ("Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."), *reprinted* in Schindler & Toman, *supra* note 4, at 6-8.

<sup>39</sup> See ROGERS, *supra* note 20, at 7.

<sup>40</sup> Lieber made it clear war was against an enemy's military. Civilians were "...to be spared in person, property and honor as much as the exigencies of war will admit" and were not to be "...murdered, enslaved or carried off..." However, civilians might suffer the hardships of war and might be harmed if it was "...incidentally *unavoidable* in the armed contests of the war." Lieber felt vigorous and "sharp wars" were briefer and better for humanity. See The Lieber Code, Arts 14, 21-25, 29 *reprinted* in Schindler & Toman, *supra* note 4, at 6-8. Gen. Sherman's Civil War acts show specifically some of the ways war harms civilians and shows Sherman's analysis of the value of a "sharp war." His troops took food, destroyed crops and burned homes to punish people for "supporting the rebel cause" but he did not kill civilians. He said, "If the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity seeking. If they want peace, they and their relatives must stop the war." and, "We cannot change the hearts and minds of those people of the South, but we can make war so terrible...[and] make them so sick of war that generations would pass away before they would again appeal to it." EDWARD C. HOLLAND III, *FIGHTING WITH A CONSCIENCE*, at 3 (1992).

<sup>41</sup> See ROGERS, *supra* note 20, at 7-14, 84-105; Parks, *supra* note 22, at 4, 14, 18. Art. 27 of Hague IV says: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Hague II, Art. 27 protects the same places, except for historic monuments. Hague II and IV, *reprinted* in Schindler & Toman, *supra* note 4, at 84. Cultural property is protected by the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954. Schindler & Toman, at 745.

<sup>42</sup> See William J. Fenrick, *Attacking the Enemy Civilian as a Punishable Offense*, 7 DUKE J. COMP. & INT'L L. 539, Spring 1997, at 545; Myrow, *supra* note 33, at 132. Proportionality may be "...inferred from Arts. 15 and 22 of the Lieber Code and is to be found elsewhere, such as in the customary rule on reprisals and in the concept of self defense..." ROGERS, *supra* note

"there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. For example, bombing a refugee camp is obviously prohibited if its only military significance is that women in the camp are knitting socks for soldiers."<sup>43</sup> Another way to look at proportionality is to consider "the reduction of incidental damage caused by military operations."<sup>44</sup> When considering proportionality, soldiers should consider how they fight. When possible, a soldier should attack at times and with means to cause the least amount of civilian casualties and damage, or may decide not to attack. For example, it is generally thought to be disproportionate to destroy an entire town to kill one sniper.<sup>45</sup>

## B. The Application of the Law of War to Aircraft

Law of War principles were well documented by the time aircraft were invented. However, the aircraft was a unique weapon and analogies to other weapons of war were often unsatisfactory.<sup>46</sup>

Some of the concepts and ideas that existed in the Law of War when aircraft were invented apply to air power, but few are "directly applicable."<sup>47</sup> Some Law of War principles from Hague II and IV apply to bombing and air power.<sup>48</sup> Article 23(g) is the same in both treaties and forbids destruction of enemy property unless it is "imperatively demanded by the necessities of war."<sup>49</sup> Hague IV, Article 25 says, "The attack or bombardment, by whatever

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20, at 14. See also, Protocol I, Art. 51, Protection of the Civilian Population, which bans indiscriminate attacks, "...an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, reprinted in Schindler & Toman, *supra* note 4, at 651. Protocol I, Art. 51 is considered the "first codification of the customary international law concept of proportionality." Danielle L. Infeld, *Precision-Guided Munitions Demonstrated Their Pinpoint Accuracy in Desert Storm*, 26 GW J. INT'L L. & ECON 109, 1992, at 118.

<sup>43</sup> See Fenrick, *supra* note 42, at 545.

<sup>44</sup> See ROGERS, *supra* note 20, at 14.

<sup>45</sup> *Id.*; Keeva, *supra* note 22, at 57; Infeld, *supra* note 42, at 119.

<sup>46</sup> See Elbridge Colby, *Aerial Law and War Targets*, 19 AM. J. INT'L L. 702, (1925). The first attempted control of airships as weapons concerned balloons, when a five-year ban on "launching of projectiles and explosives from balloons, or by other new methods of similar nature" was adopted at The Hague in 1899. Colby, *supra* at 703; DeSaussure, *supra* note 23, at 45; Declaration to Prohibit For The Term of Five Years the Launching of Projectiles and Explosives from Balloons, and Other Methods of a Similar Nature, The Hague, July 29, 1899, reprinted in Schindler & Toman, *supra* note 4, at 201.

<sup>47</sup> See DeSaussure, *supra* note 23, at 45.

<sup>48</sup> See Infeld, *supra* note 42, at 114; Hague II and IV, reprinted in Schindler & Toman, *supra* note 4, at 63-98.

<sup>49</sup> See Hague II and IV, reprinted in Schindler & Toman, *supra* note 4, at 83. Art. 23(g) of both Hague II and IV says it is forbidden "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessity of war."

means, of towns, villages, dwellings, or buildings which are undefended is prohibited."<sup>50</sup> Hague IV, Article 26 requires "The officer in command of an attacking force must, before commencing a bombardment, except in cases of an assault, do all in his power to warn the authorities."<sup>51</sup> Hague IV, Article 27 protects buildings devoted to religion, art, science, historic monuments, hospitals and the sick and wounded from bombing, so long as the places are not used for military purposes.<sup>52</sup>

The bombing rules of Hague II and IV show the principles of military necessity and humanity by limiting targets to those required by military necessity and by protecting certain religious, cultural, and medical facilities. The Convention (IX) Concerning Bombardment by Naval Forces in Time of War, signed at The Hague on October 18, 1907, takes a different approach.<sup>53</sup>

Hague IX, Article 1 forbids the bombardment of undefended "ports, towns, villages, dwellings or buildings."<sup>54</sup> However Article 2 lists specific targets that are not covered by the prohibition of Article 1, and also seems to absolve the commander of unintended consequences.<sup>55</sup> Article 5 requires com-

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<sup>50</sup> *Id.* at 83-84. Hague IV, Art. 25 is identical to Hague II, Art. 25, except for changing "habitation" to "dwelling" and adding "by whatever means," a term added deliberately to make air attacks illegal. Colby, *supra* note 46, at 703. Some say "undefended" means "without military value." Jochnick & Normand, *supra* note 3, at 72. Parks says the undefined "undefended" caused confusion, but was not meant to "prohibit the intentional destruction of any buildings, when military operations rendered it a necessity." Parks, *supra* note 22, at 15.

<sup>51</sup> See Hague II and IV, *reprinted in* Schindler & Toman, *supra* note 4, at 84. Hague II, Art. 26 says, "The Commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities."

<sup>52</sup> See Hague II and IV, *reprinted in* Schindler & Toman, *supra* note 4, at 84. Hague IV, Art. 27 is almost identical to Hague II, Art. 27, except for adding "historical monuments." Art. 27 also requires a besieged to show protected buildings by distinctive sign and notify the enemy. McCoubrey comments on Arts 25-27. For Art. 25, she points out that in modern war, cities are often defended by anti-aircraft artillery. But, the Japanese argued in the Shimoda case that Hiroshima and Nagasaki were undefended before the atomic bombs. She does not discuss if fighter planes are "defense." She points out most bombardments are part of assaults, and a warning would invite attack on the warning party. Art. 27 shows "The basic principle of limitation of legitimate bombardment to military objectives..." MCCOUBREY, *supra* note 20, at 219. Note that the changes from Hague II to Hague IV offer more protections to non-combatants and protected property.

<sup>53</sup> See Convention (IX) Concerning Bombardment By Naval Forces in Time of War [hereinafter Hague IX], Signed at The Hague, Oct. 18, 1907, *reprinted in* Schindler & Toman, *supra* note 4, at 811.

<sup>54</sup> *Id.*

<sup>55</sup> See Appendix for text. See also Parks, *supra* note 22, at 17-19. Parks finds the treaty a key reflection of customary law. It shows bombing is "related to the military significance of the target" and not whether the area is "defended" or "undefended." It shows targets are lawful regardless of where they are located. It lists lawful targets that include military targets, and, "industrial targets of value to the enemy war effort." Lastly, the treaty relieves "the attacker of the responsibility for 'unavoidable' collateral damage." Parks ends with a comparison to sieges, saying "...collateral civilian casualties during a siege were regarded as a burden upon

manders "spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals and places where the sick or wounded are collected" as long as these sites are not used for a military purpose. The inhabitants have the duty to mark such sites. Article 6 requires a commander to "do his utmost" to give warning to authorities before a bombardment.<sup>56</sup>

### C. The Hague Rules of Air Warfare of 1923

The next advance in the Law of War was a convention written specifically for aircraft.<sup>57</sup> After World War I, people began to consider rules for aircraft,<sup>58</sup> which uniquely travel at high speeds and rise in the air.<sup>59</sup> Representatives from France, Italy, Great Britain, Japan, the U. S. and Holland met from December 1922 until February 1923 at The Hague.<sup>60</sup> The delegations had senior military personnel as advisors.<sup>61</sup> The delegates created the Hague Rules of Air Warfare, Drafted by a Commission of Jurists at The Hague. The rules were "never adopted in legally binding form" by any nation and include bombing rules in Articles 22-24.<sup>62</sup>

Even though they were never adopted, the 1923 Air Rules have much in common with previous Law of War treaties. The 1923 Air Rules restrict military objective or necessity, as Articles 22 and 23 ban terrorizing civilians, damaging private non-military property, injuring non-combatants, and bombing to

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the besieged commander - an inducement to end the siege. Bombardment not connected to a siege but resulting in collateral civilian casualties was not illegal: it was merely a cost of doing the business of war." Parks, *supra*, at 19.

<sup>56</sup> See Hague IX, reprinted in Schindler & Toman, *supra* note 4, at 811.

<sup>57</sup> See SIPRI, *supra* note 3, at 23; Dieter Fleck, *Strategic Bombing and the Definition of Military Objectives*, 27 ISRAEL YEARBOOK OF HUMAN RIGHTS, at 43-44, (1997); Judith Gardam, *Proportionality and Force in International Law*, 87 A.J.I.L. 391, at 400, (July 1993).

<sup>58</sup> See JOHN BASSETT MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS, at 182 (1924). "The Washington Conference of 1922 on the Limitation of Armaments adopted a resolution for the appointment of a Commission of Jurists charged with the preparation of rules relating to aerial warfare." See Introductory note to the 1923 Air Rules, Schindler & Toman, *supra* note 4, at 207; Parks, *supra* note 22, at 24.

<sup>59</sup> See MOORE, *supra* note 58, at 190.

<sup>60</sup> *Id.* at 184; Introductory Note to 1923 Air Rules, Schindler & Toman, *supra* note 4, at 207.

<sup>61</sup> See MOORE, *supra* note 58, at 182. Moore, a member of the Permanent Court of International Justice at The Hague, was head of the twelve-person U.S. delegation; which included Rear-Admiral Rodgers, of the U.S. Navy and previously President of the Naval War College, a Brigadier General and seven other military officers. Moore's book lists all delegates and advisors. Parks, *supra* note 22, at 25.

<sup>62</sup> See Schindler & Toman, *supra* note 4 at 207. See Appendix for text of Art.s 22-24 and for other target lists.

collect funds. Article 24, part (1) has a strict definition of military necessity, further defined and restricted by parts (2), (3) and (4).<sup>63</sup>

Article 24, part (2) has a list of proper targets. If there is a military objective under Article 24, part (1), then bombing is "...legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories containing important and well-known centers engaged in the manufacture of arms, ammunition or distinctly military supplies; lines of communications or transportation used for military purposes."<sup>64</sup>

When considering the location of targets, the 1923 Air Rules do not distinguish between defended and undefended towns, as did Hague II and IV.<sup>65</sup> The 1923 Air Rules protect populated areas "...not in the immediate neighborhood of..." land forces. If the proper objectives of bombing, from Article 24, part (2), are away from land forces, they may not be bombed. This ban may be considered strict "proportionality." If the appropriate targets are near the front lines, commanders may only bomb them when the target is sufficiently important to risk the civilian deaths, in accordance with Article 24, part (4). Of course, this allows the commander to make the proportionality balance.<sup>66</sup> Besides the guidance of Articles 22 through 24, the 1923 Air Rules do not require an attacking commander to take specific precautions, other than those that can be inferred.<sup>67</sup>

#### D. Development of Air Rules Since 1923

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<sup>63</sup> Note similarities in The Lieber Code, Hague II and IV, and the 1923 Air Rules. All protect cultural, medical, and historic places. Art. 25 of the 1923 Air Rules directs a bombing commander to take "all necessary steps" to "spare as far as possible" places devoted to "public worship, art, science, or charitable purposes, historic monuments, hospital ships, hospitals and other places where the sick and wounded are collected." This is similar to Art. 34 of the Lieber Code and Art. 27 of Hague II and IV. Art. 25 of the 1923 Air Rules has instructions for how to mark protected buildings. Art. 26 has procedures for protection of historical monuments. See Schindler & Toman, *supra* note 4 at 63-98, 207-217.

<sup>64</sup> *Id.* at 210-211. See JULIUS STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* (1959), at 624. Fleck finds the definition of objective and the target list too restrictive. Fleck, *supra* note 57, at 44.

<sup>65</sup> See ROGERS, *supra* note 20, at 51; Gardam, *supra* note 57, at 400.

<sup>66</sup> See Gardam, *supra* note 57, at 400. It is important to distinguish between indiscriminate attacks and collateral damage. Indiscriminate attacks strike unselectively, at military and civilian targets or at random. Collateral damage is the unintended damage resulting from an attack on a valid military target. "There is no way to avert altogether collateral damage to civilians. Accidents are beyond control by human beings." See Yoram Dinstein, *The Laws of Air, Missile and Nuclear Warfare*, in 27 *ISRAEL YEARBOOK ON HUMAN RIGHTS*, at 6 (1997).

<sup>67</sup> See ROGERS, *supra* note 20, at 51. Inferred precautions may be set by humanity, chivalry and similar standards or by international law.

Since 1923, there have been many statements on bombing and law, including some by national leaders. However, law is also shown by nations' actions. The actions can form custom over the course of time and show international law as applied to specific situations.<sup>68</sup> Therefore, this section will discuss the words of national leaders, state practice, and treaties. However, a leader's words may often conflict with their actions. This often makes international law difficult to define.

### *1. Leaders' Statements*

Just before World War II, British Prime Minister Neville Chamberlain proposed three bombing principles. He said: it was illegal to bomb or deliberately attack civilians; targets attacked from the air must be identified military objectives; and, any military objectives attacked must be struck with reasonable care so civilians are not hurt.<sup>69</sup> The League of Nations adopted Chamberlain's three points in a non-binding resolution in September 1938.<sup>70</sup>

On September 1, 1939, President Roosevelt sent a message to Poland, Italy, Germany, France and England asking them to agree not to bomb "civilian populations in unfortified cities."<sup>71</sup> France and England agreed.<sup>72</sup> Hitler gave

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<sup>68</sup> See *The Paquete Habana*; *The Lola*; and *Filartiga v. Pena-Irala*, *supra* note 21.

<sup>69</sup> Chamberlain spoke on June 21, 1938 in the House of Commons, *reprinted in* J. M. SPAIGHT, *AIR POWER AND WAR RIGHTS*, at 257, (3rd ed. 1947). See ROGERS, *supra* note 20, at 10, 52-53; Jochnick & Normand, *supra* note 3, at 85-85. In 1937, British plans called for strikes on: German Air Forces and maintenance; German aircraft industry; German military rail, canal, and road communications when there was a concentration of armies, or to delay an invasion of Holland, Belgium and France; German war industry, including the Saar, Ruhr and Rhineland regions. After Chamberlain's comments, a British committee headed by Sir Malkin, reported on the Law of War and bombing. The committee "rejected a total prohibition on bombing and any restriction limiting bombing to the immediate area of military or naval operations." The committee recommended against bombing at night, except near land or sea forces, and created specific guidance and a target list. Sir Malkin's proposals were never used. Parks, *supra* note 22, at 43-44. See Appendix for Prime Minister Chamberlain's words and the text of Sir Malkin's Committee's Guidance.

<sup>70</sup> The three principles were adopted without dissent, see Appendix for text of assembly's action. Germany and Japan were not at the vote. *Reprinted in* Schindler & Toman, *supra* note 4, at 221; SPAIGHT, *supra* note 69, at 257; Parks, *supra* note 22, at 36. The 1938 International Law Association's 40th convention in Amsterdam wrote a Draft Convention for the Protection of Civilian Populations Against New Engines of War, with 32 art.s. The draft said: civilians shall not be targets; undefended towns shall not be bombed; indiscriminate bombardment is banned; chemical, incendiary, and bacterial weapons are prohibited; and, safety zones shall be set to protect those under 15, those over 60, and noncombatants. This convention was not accepted by any nation. Schindler & Toman, *supra* note 4, at 223.

<sup>71</sup> See SPAIGHT, *supra* note 69, at 259; Parks, *supra* note 22, at 36-37. This was not a new U.S. government opinion. After Japan attacked Nanking, China, in Sept. 1937, the U.S. sent Japan a response, saying, "This government holds the view that any general bombing of an extensive area wherein there resides a large populace engaged in peaceful pursuits is unwarranted and



an "unqualified agreement" to limit bombing to military objectives.<sup>73</sup> The agreements to Roosevelt's ideas did not last long once the war started. Germany bombed Rotterdam and other cities.<sup>74</sup> England and the U.S. bombed German cities.<sup>75</sup> The U.S. destroyed Japanese cities.<sup>76</sup>

## 2. State Practice

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contrary to the principles of law and humanity." Japan and the world ignored the U.S. comment. HOLLAND, *supra* note 40, at 11.

<sup>72</sup> See SPAIGHT, *supra* note 69, at 259.

<sup>73</sup> *Id.* at 260.

<sup>74</sup> Germany bombed Rotterdam in May 1940 and English cities starting in Sept. 1940. WILLIAMSON MURRAY, *WAR IN THE AIR*, at 118 (1999); R. ERNEST DUPEY & TREVOR N. DUPEY, *THE ENCYCLOPEDIA OF MILITARY HISTORY FROM 3500 B.C. TO THE PRESENT*, 1065-1066, (2nd ed., 1986).

<sup>75</sup> On Aug. 28-29, 1940, British bombers attacked Berlin. Karl Klee, *The Battle of Berlin*, in *DECISIVE BATTLES OF WORLD WAR II*, at 88 (H. A. Jacobsen & J. Rohwer eds, Edward Fitzgerald trans., 1965). England bombed other German cities early in the war. MAX HASTINGS, *BOMBER COMMAND*, at 99-113 (1979); SIPRI, *supra* note 3, at 31. As Allied air power grew, mass bombings of German city "target areas" started. "While each belligerent claimed that it bombed only military objectives, and that the enemy bombed civilians, it is clear that both became increasingly tolerant of vast incidental damage to the cities and their populations." STONE, *supra* note 64, at 626.

<sup>76</sup> In Mar. 1945, U.S. raids on Tokyo killed 90,000. CONRAD C. CRANE, *BOMBS, CITIES AND CIVILIANS*, at 120 (1993). Many reasons are given for why the U.S. bombed cities in World War II, including: It was part of a "total war" strategy against a strong German enemy.; Daylight raids in Europe had huge losses and night bombing of cities was more effective.; In Europe and Japan, cities were destroyed to end the war quickly.; In Japan, high altitude raids were inaccurate and firebombing was more effective.; and, The bombing in Japan was to destroy dispersed industry and force the surrender of a military society that had fought to the end at Iwo Jima and Okinawa. BUCKLEY, *supra* note 3, at 125-195. Several "fathers" of modern air power argued civilians should be bombing targets. British Gen. Hugh Trenchard felt bombing populated industrial centers would destroy enemy morale and since bombing's psychological effects were more important than the physical effects, bombing should target civilian morale. BUCKLEY, *supra* at 77-78. In the U.S., Lt. Col. Edgar Gorrell argued in 1917 for bombing Germany's major industrial centers to keep supplies from the front and destroy civilian morale. Richard J. Overy, *Strategic Bombing Before 1939: Doctrine, Planning, and Operations*, in *CASE STUDIES IN STRATEGIC BOMBARDMENT* (R. Cargill Hall, ed. 1998) at 21-22. U.S. Gen. Billy Mitchell saw World War I end just as German industrial cities were coming into bomber range. The enemy knew if the war continued, the cities would be "...laid in ruins." Mitchell saw the importance of bombing in future wars and "...emphasized selection and destruction of the vital centers on which the enemy's war-making capacity depended." Overy, *supra* at 39-40. In the 1920's, Italian Gen. Giulio Douhet found no difference between civilians and combatants in "total war" because entire nations fought each other. Since World War I showed ground troops could not quickly end a war, heavy bombers should attack the enemy's population and industry centers to destroy their morale or will to resist. BUCKLEY, *supra*, at 74-75. Douhet felt bombing should continue until "the people themselves, driven by the instinct of self-preservation, would rise up and demand an end to the war." Overy, *supra*, at 39-40. Compare Douhet's words with Gen. Sherman's comment, *supra*, note 39.

In the early part of World War II, British leaders wanted to bomb only military targets and avoid harming the enemy civilian population. They knew this limit may not last long in a war, but did not want to be the first to strike civilians.<sup>77</sup> During the war, bombing attacks in daytime suffered huge losses and Germany and England turned to night raids.<sup>78</sup> Attacks often missed their targets due to targeting systems limitations, small bomb loads and enemy air defenses<sup>79</sup> this caused collateral damage or collateral deaths, a way that warfare affects enemy morale.<sup>80</sup>

For much of the war, the U.S. used a precision bombing strategy against military targets and resisted British requests for night raids.<sup>81</sup> Early in 1945, the U.S. made a massive raid on Berlin that hit rail and government targets, but killed over 25,000 civilians.<sup>82</sup> Later, the U.S. and Britain razed Dresden. The bombing of this cultural city, full of refugees, has become controversial; especially since many military targets there were not struck.<sup>83</sup>

Some of the greatest controversy about Allied bombing was that attacks on the morale of the civilian population did not work to end the war. Germany had to be conquered by troops before the war was over.<sup>84</sup> Bombing damage was often quickly repaired. Only the Allied strikes against German oil and ball bearings were really effective in slowing the German war machine, at least until Germans could reorganize after the bombing.<sup>85</sup> However, it is argued "area"

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<sup>77</sup> See Parks, *supra* note 22, at 44-45.

<sup>78</sup> See SIPRI, *supra* note 3, at 31; HOLLAND, *supra* note 40, at 15. In the Nov. 14-15, 1940, nighttime raid on Coventry, British fighters shot down no German planes, and only two German aircraft were lost to anti-aircraft artillery (AAA). Klee, *supra* note 75, at 90.

<sup>79</sup> See SIPRI, *supra* note 3, at 31.

<sup>80</sup> See Parks *supra*, note 22, at 51.

<sup>81</sup> See HOLLAND, *supra* note 40, at 16-20. U.S. General Eaker was reluctant to move to night raids and wrote "We must never allow the record of this war to convict us of throwing the strategic bomber at the man in the street." *Quoted in* HOLLAND at 16.

<sup>82</sup> *Id.*, at 16-20.

<sup>83</sup> See STEPHEN A. GARRETT, *ETHICS AND AIRPOWER IN WORLD WAR II*, at 19-21, 81-85, (1993); ALEXANDER MCKEE, *DRESDEN*, at 45-46, 243 (1982); SIPRI, *supra* note 3, at 34-35. *But see* BUCKLEY, *supra*, note 3, at 163-164.

<sup>84</sup> See ROBERT A. PAPE, *BOMBING TO WIN*, at 24 (1966). Civilians did not remove Hitler. Germany did not surrender prior to complete defeat. The U.S. Strategic Bombing Survey found that morale (mood and feelings) of the German people may have been depressed, but this did not affect their behavior. BARRIE PASKINS & MICHAEL DOCKRILL, *THE ETHICS OF WAR*, at 45, (1979).

<sup>85</sup> Attacks on German oil and ball bearing sites had mixed results. "Factory buildings were leveled, but they could and would be rebuilt in a matter of weeks unless they were bombed repeatedly. The cost to the attacking bomber forces were appalling." Stephen L. McFarland and Wesley Phillips Newton, *The American Strategic Air Offensive Against Germany in World War II*, in Hall, *supra*, note 76, at pages 195-204. For example, a large July 1943 raid on Hamburg did not significantly affect war output. In Sept. 1943, Hamburg could "handle 160,000 tons of cargo, only 40,000 tons less than in July." German war production rose in many ways from 1942 to 1944. GARRETT, *supra* note 83, at 62, 157. The British Bombing

bombing did help win the war. It forced Germany to devote men, material and arms to defending cities from air attack, and the bombing affected the leaders, causing them to retaliate with the costly revenge weapons, V-1 and V-2 rockets.<sup>86</sup> The fire and nuclear bombing of Japan was also controversial. Supporters are convinced the bombing ended the war and saved a half million Allied lives.<sup>87</sup> Others are sure that the war could have been ended by a Japanese surrender with fewer civilian deaths.<sup>88</sup>

Many reasons are used to support the Allied bombing campaigns in Europe and Japan. Perhaps the Laws of War did not properly cover the new weapons and techniques used in World War II or that the law on distinction only required "ordinary care."<sup>89</sup> Sir Harris felt precision bombing was not advanced enough and far too costly in men and aircraft; so night bombing was required to defeat a strong enemy.<sup>90</sup> Some focused on the defender's responsibility to protect civilians by keeping them away from legitimate military targets.<sup>91</sup> Others find no proper justification for the bombing that killed so many civilians.<sup>92</sup>

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Survey Unit found "area attacks against German cities could not have been responsible for more than a very small part of the fall which actually occurred in German production by the spring of 1945, and ...were also a very costly way of achieving the results..." *Quoted in SIPRI, supra note 3, at 35.*

<sup>86</sup> See MURRAY, *supra* note 74, at 100; BUCKLEY, *supra*, note 3, at 165-169..

<sup>87</sup> President Truman said in 1959, "I wanted to save a half million boys on our side...I never lost any sleep over the decision." *Quoted in Barton J. Bernstein, A Post-War Myth: 500,000 U.S. Lives Saved, in Bird & Lifschultz, supra note 3, at 130.*

<sup>88</sup> Both sides are shown in HIROSHIMA'S SHADOW, Bird & Lifschultz, *supra* note 3. It is said the U.S. demanded an unconditional surrender, then dropped the atomic bombs and accepted a conditional surrender. It is also argued that the campaign against Japan was necessary because of the limit of U.S. aircraft. Strategic precision bombing was not effective, but firebombing was effective. HOLLAND, *supra* note 40, at 23-28.

<sup>89</sup> See Parks, *supra* note 22, at 51-52. "Distinction" focuses on intent. If the attacker intends to strike a military objective, then "collateral damage" is excused. But for firebombing, attackers use explosive and incendiary bombs to destroy large parts of a city, not just specific military targets. Distinction is complicated by the increased accuracy of bombs after the development of radio and radar targeting devices. If the British had to hit Germany somehow, and "area bombing" was all they had, then perhaps collateral damage may be excused. But, by mid-1944, the Allies had command of the air and targeting devices that improved accuracy. GEOFFREY BEST, HUMANITY IN WARFARE, at 280 (1980).

<sup>90</sup> See ELMER BENDINER, THE FALL OF THE FORTRESSES, at 68-70 (1980). A frequent question is "Must the attackers risk their lives to bomb a target as accurately as possible?" Attackers often want to bomb at night or from high altitude for their safety, which makes bombing less accurate. This was an issue in World War II, Kosovo and in other conflicts. See *Final Report, supra* note 5, at 15.

<sup>91</sup> See Parks, *supra* note 22, at 51. Parks says defender, attacker and civilian all must protect the civilian, and defensive measures, such as fighters or artillery, may cause bombers to miss, increasing collateral damage. See also, Hays Parks, *The Protection of Civilians from Air Warfare*, in ISRAEL YEARBOOK ON HUMAN RIGHTS, at 65-111 (1998). Geoffrey Best, and others,

The next illustration of custom and practice and U. S. bombing was the 1950-53 Korean War. U.S. actions in Korea followed the practices set in World War II. The U.S. "gained air superiority over the North Koreans and launched punishing interdiction attacks" that "definitely blunted the initial North Korean thrust to the southward."<sup>93</sup> The initial strategic bombing strategy was to bomb North Korean industry but not cause massive damage to population centers. The strategy was designed so that the enemy could not claim "illegal" attacks were made against civilians.<sup>94</sup> The Joint Chiefs of Staff did not want to use incendiary weapons against cities because the U.S. might have to rebuild the damage after the war and also because it might not reduce enemy morale.<sup>95</sup>

The initial bombing strategy changed after Chinese troops entered the war. Then, the Air Force was ordered to destroy communication systems and towns, cities and villages and was allowed to use incendiary weapons.<sup>96</sup> Some air attacks were designed to destroy the morale of civilians who supported the enemy. This included bombing targets around Pyongyang, after leaflets had warned residents.<sup>97</sup> Dams were struck to destroy lines of transportation, but this also threatened the rice crop and flooded enemy underground bunkers.<sup>98</sup>

During the Korean War, U.S. planes bombed factories, arsenals, docks, bridges, warehouses, railcars, locomotives, chemical plants, dams, and trucks.<sup>99</sup> In addition to high explosive bombs, the U.S. used napalm, incendiary and oil bombs against tanks, troops, armored vehicles, enemy gun positions, villages and cities.<sup>100</sup>

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point out the blurring of the lines between civilians and military in modern "total war." BEST, *supra* note 89, at 285.

<sup>92</sup> See GARRETT, *supra* note 83, at 183. Paskins & Dockrill are critical of Allied bombing for "lacking in coherent thought, as lacking in proportion, and as violating the rights of noncombatants." Paskins & Dockrill, *supra* note 84, at 251. Jochnick & Normand point out, "The Nuremberg Tribunal actually helped legitimate unrestrained conduct in war by refusing to convict or even prosecute, based on violations of the laws of war." Jochnick & Normand, *supra* note 3, at 94-95. Simon Jenkins says if ground troops had taken Dresden and killed 25,000 civilians while destroying the city, it would be a war crime; and bombers should not terrorize from the air. Simon Jenkins, *supra* note 15. Questions on the legality or morality of firebombing are not new. In 1944, Father Ford wrote "the air bombardment of civilian centers is a symbol of total war in its worst sense." See John C. Ford, *The Morality of Obliteration Bombing*, at 40, reprinted in *WAR AND MORALITY* (Richard Wasserstrom ed. 1970), first printed in *THEOLOGICAL STUDIES*, Vol. 5, at 261 (1944).

<sup>93</sup> See Herman S. Wolk, *Truman's War*, AIR FORCE MAGAZINE, Nov. 2000, at 56.

<sup>94</sup> See Thomas C. Hone, *Strategic Bombardment Constrained: Korea and Vietnam*, in Hall, *supra*, note 76, at 473.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 478-479

<sup>97</sup> *Id.* at 488.

<sup>98</sup> *Id.* at 489-490.

<sup>99</sup> *Id.* at 477.

<sup>100</sup> See SIPRI, *supra* note 3, at 43-47.

The U.S. used napalm again in the Vietnam War, but added a new weapon, defoliants, including "Agent Orange." Napalm and defoliants destroyed groundcover and food supplies.<sup>101</sup> Napalm and other incendiaries gave troops "close air support" and destroyed villages, huts, military buildings, troop positions, radar sites, communications sites, supply locations, roads, and factories.<sup>102</sup> Other targets included military targets, power plants, oil, rail, roads, bridges, and industry. The enemy would get U.S. forces to strike civilian villages by firing from the villages and quickly leaving before the air strikes came.<sup>103</sup>

Although the U.S. struck a wide variety of targets in the Vietnam War, air power was not decisive.<sup>104</sup> Bombing was used to cut enemy supply lines in an aerial interdiction role, but an "all-out bombing campaign" against North Vietnam was not used because of fear that China might enter the conflict.<sup>105</sup> Instead of being used to decisively win the war, air power was often used for political reasons. The ROLLING THUNDER bombing campaign was used to push for a political settlement.<sup>106</sup> Later, the LINEBACKER campaign was started to stop an invasion, but LINEBACKER II and strikes against Hanoi were used to aid the Saigon government and as tools for diplomatic purposes.<sup>107</sup> While the bombing had a military purpose, it was also designed to force North Vietnam to the peace talks.<sup>108</sup>

While the air campaigns in the Vietnam War often had political goals, air power played a more decisive role in later conflicts. The next major U.S. conflict that illustrates custom and practice was the 1991 Gulf War.<sup>109</sup> The strategy for the air campaign reflected the ideas of U.S. Air Force Colonel John

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<sup>101</sup> See COMMITTEE ON THE EFFECTS OF HERBICIDES IN VIETNAM, THE EFFECTS OF HERBICIDES IN SOUTH VIETNAM, at II-3 to II-10 (1974), and SIPRI, *supra* note 3, at 49-58.

<sup>102</sup> See SIPRI, *supra* note 3, at 49-58.

<sup>103</sup> See TILFORD, *supra* note 3, at 71, 75, 81-82, 93, 103.

<sup>104</sup> The U.S. ambassador to South Vietnam said bombing, "though extremely important, has neither interdicted infiltration nor broken the will of the North Vietnamese, and it is doubtful that it can accomplish either." The war had a difficult slow target selection process with nine levels of approval. TILFORD, *supra* note 3, at 89, 109-140, 283. During the war "smart" bombs were used. These have laser or electro-optical guidance systems and are much more accurate than other bombs. "President Johnson's personal control of the bombing resulted in severe restrictions that frustrated and hampered his military leaders." HOLLAND, *supra* note 40, at 34-35.

<sup>105</sup> See Hone *supra* note 94 at 495-496

<sup>106</sup> *Id.* at 500

<sup>107</sup> See Tilford *supra* note 3, at 228; Hone *supra* note 94 at 513-514

<sup>108</sup> See Tilford *supra* note 3, at 234; Parks *supra* note 3, at 27.

<sup>109</sup> Also called "The Second Persian Gulf War" and "Operation Desert Storm." EDWARD C. MANN, III, THUNDER AND LIGHTNING: DESERT STORM AND THE AIRPOWER DEBATES, at 2-4, 193, (1995).

Warden.<sup>110</sup> His focus for air campaigns is destroying "centers of gravity," the "characteristics, capabilities, or locations from which the enemy derives his freedom of action, physical strength, or will to fight."<sup>111</sup> Warden's ideas are represented by a model of five concentric circles, much like a "bull's-eye." The most important "ring" is the innermost, the National Leadership and its communications. The rest of the rings, moving out from the center are: Key Production, including energy, research, and "bottleneck industries;" National Infrastructure, including transportation; National Population; and, the outermost ring, the Fielded Military Forces.<sup>112</sup>

Using Warden's five-ring model, target sets were selected. When attacking Leadership, the air campaign attacked Iraq's leadership to paralyze it and to destroy communications required for command and control.<sup>113</sup> War plans included striking at military and civilian power plants and telecommunications sites to eliminate Hussein's ability to control his troops and wage war.<sup>114</sup> When striking Key Production, the campaign bombed targets relating to electricity, oil distribution and storage, and, weapons research and development and production including Scud missile launchers.<sup>115</sup>

The U.S. officers who planned the air war and picked targets were trained in the Law of War. They considered military necessity, humanity and limiting civilian casualties in their planning.<sup>116</sup> The U.S. used precision-guided

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<sup>110</sup> See Richard G. Davis, *Strategic Bombing in the Gulf War*, in Hall *supra* note 76, at 535, 540. Col. John A. Warden III's strategy is outlined in his book *THE AIR CAMPAIGN: PLANNING FOR COMBAT* (1988).

<sup>111</sup> See Davis, *supra* note 110, at 535; Warden *supra* note 110, at 7-8.

<sup>112</sup> See Mann, *supra* note 109, at 36; Davis *supra* note 110, at 535

<sup>113</sup> See Davis *supra* note 110, at 535-541.

<sup>114</sup> See COL RICHARD T. REYNOLDS, *HEART OF THE STORM: THE GENESIS OF THE AIR CAMPAIGN AGAINST IRAQ*, at 54 (1995).

<sup>115</sup> See Davis, *supra* note 110, at 541; LT COL WILLIAM F. ANDREWS, *AIRPOWER AGAINST AN ARMY*, at 28-31 (1998). Other target sets in the war included:

Leadership; Command, Control and Communications; Strategic Air Defenses; Airfields; Nuclear, Biological, and Chemical Research and Production; Naval Forces and Port Facilities; Military Storage and Production; Railroads and Bridges, Electrical Power; and Oil Refining and Distribution Facilities. [U.S. Gen.] Schwartzkopf added the Republican Guard as a category and Scuds soon emerged as a separate target set. After the beginning of Desert Storm, two more categories appeared; fixed surface-to-air missile sites in the KTO [Kuwaiti Theater of Operations] and breaching sites for the ground offensive.

W. MURRAY, *AIR WAR IN THE PERSIAN GULF*, at 32 (1995), *quoted in Final Report*, *supra* note 5, at 12.

<sup>116</sup> See DeSaussure, *supra* note 23, at 58-59; Humphries, *supra* note 3, at 26. Key targeting limits were "the need to minimize Iraqi civilian casualties" and protect "cultural and religious sites." Some attacks were changed to limit the effect of misses on civilians, even if aircrews

munitions to limit civilian deaths.<sup>117</sup> During the war, Judge Advocates advised commanders on how to accomplish their missions legally, including giving specific guidance on tactics and targeting decisions.<sup>118</sup>

In Operation Deliberate Force, the U.S., UN and NATO used the Law of War to build Rules of Engagement for the 1995 air campaign in Bosnia.<sup>119</sup> The campaign was created to promote peace.<sup>120</sup> The planners considered "cen-

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faced greater danger or it reduced a weapon's effectiveness. Only Cruise missiles and precision munitions were used in downtown Baghdad, with strikes at night. Areas near cultural or religious sites were not targeted, even if Iraqis put military material or functions in these areas. JAMES A. WINNEFELD, ET AL., *A LEAGUE OF ARMEN*, at 178 (1994).

<sup>117</sup> See DeSaussure, *supra* note 23, at 60-61.

<sup>118</sup> See Humphries, *supra* note 3, at 26; Keeva, *supra* note 22, at 52; Myrow, *supra* note 33, at 135. Specific examples of JAGs giving advice include advising not to strike parked Iraqi fighters near the Temple of Ur, and telling commanders that they could take a more "liberal approach" when striking particular targets. Keeva, *supra* at 57-58; Myrow, *supra* at 141. Maj Heintzelman collected information about a specific location and shared it with commanders on the targeting committee. Keeva, *supra* at 58. He also knew that some laser guided weapons "usually fell short or long, but rarely landed right or left of their target." This let him recommend directions of attack to minimize collateral damage. Myrow, *supra* at 140.

<sup>119</sup> ODF started in Bosnia on Aug. 30, 1995, after a brutal mortar attack on Sarajevo. NATO's response was air attacks on Bosnian Serb military targets until Sept. 20, 1995. The U.S. flew two-thirds of the missions. Larry K. Wentz, *Bosnia - Setting the Stage*, in *LESSONS FROM BOSNIA*, at 23 (Larry Wentz, ed., 1997). It was key to limit any collateral civilian deaths. Rules of Engagement (ROE) had to be "restrictive enough to satisfy the political and operational sensitivities of both NATO and UN political and military authorities." Lt Col Ronald M. Reed, *Chariots of Fire: Rules of Engagement in Operation Deliberate Force*, in *DELIBERATE FORCE: A CASE STUDY IN EFFECTIVE AIR CAMPAIGNING*, at 381 (Col Robert C. Owen, ed., 2000). The final ROE "walked this tightrope of competing influences." The "planners who wrote the ROE-vigorously supervised by UN, NATO and individual national authorities-attempted to include the maximum amount of military flexibility within the politically charged planning environment. Since the NAC [North Atlantic Council, the ruling body of NATO] approved all ROE, any one of the 16 sovereign NATO member nations had veto power over the rules." Reed, *supra*, at 397. Initial ROE required high-level approval from both UN and NATO leaders for any use of force, a "dual-key" approach. This delayed any response, and led to the July 1995 loss of Srebrenica and Zepa. "Because of the negative experience with the dual-key process and the perceived inability of the UN political structure to make timely decisions, NAC stressed the importance of the UN's transferring execution authority for air actions to its military commanders." Reed, *supra*, at 407. This helped military response time, but problems remained in coordinating the different NATO, UN and U.S. ROE. "The restrictions placed on targeting remind one of those used in Vietnam. Unlike the political restrictions placed on military operations in Vietnam, however, in Deliberate Force the military's own restraint limited operations." The military "may now be tying its own hands." Reed, *supra*, at 416-417. ODF primarily used smart bombs, and "nearly 70 percent of all munitions used and more than 98 percent of munitions dropped by the United States were precision munitions." Reed, *supra* at 419.

<sup>120</sup> See Col Robert C. Owen, *Preface*, in Owen, *supra* note 119, at xvii.

ters of gravity" in their target selection.<sup>121</sup> Targets and plans were coordinated with UN leadership, NATO leadership, and unit commanders. The planning process for the initial air strikes took four to five months.<sup>122</sup> Initial targets included air defense systems, communications nodes and ammunition storage facilities; but later targets included fielded forces, bridges and "choke points."<sup>123</sup> Planning and control of the air operations focused on keeping Serb military and civilian casualties to a minimum, so NATO would not appear to be taking sides.<sup>124</sup>

Political concerns complicated the 1999 operations in Kosovo<sup>125</sup> forcing commanders to keep collateral damage to a minimum, while complicating the targeting process with coordination through 19 NATO nations.<sup>126</sup> Specific

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<sup>121</sup> See Col Maris McCrabb, *US and NATO Doctrine for Campaign Planning*, in Owen, *supra* note 119, at 65-81; Col Christopher M. Campbell, *The Deliberate Force Air Campaign Plan*, in Owen, *supra* note 119, at 101.

<sup>122</sup> The air strikes had to be approved by both NATO and UN leadership in a "dual-key" process.

Some people have called into question the concept of the dual-key command-authorization system uneasily developed between the UN and NATO. Undoubtedly, this process violated the principle of unity of command, especially in cases of tactical-level close air support operations that demand a suitable structure to relay near-real-time information and command decisions. Ambassador Richard Holbrooke flatly stated that "the dual key system was an unmitigated disaster. It did great damage to both the UN and NATO." Because of the differences between the two organizations and their mandates, he believed that NATO and the UN never should have been related in this fashion. Ultimately, though, a modified version of this process could have-perhaps should have-been devised...In hindsight, critics can declare that the arrangements could have worked much better, and to some extent that viewpoint has validity.

Lt Col Bradley S. Davis, *The Planning Background*, in Owen, *supra* note 119, at 59-60. Officers hesitate to criticize superiors in writing. Holbrooke's quote may show Davis' real opinion.

<sup>123</sup> *Id.* at 37-60; Campbell, *supra* note 121, at 114.

<sup>124</sup> See Lt Col Mark J. Conversino, *Executing Deliberate Force, 30 August-14 September 1995*, in Owen, *supra* note 119, at 159.

<sup>125</sup> The NATO air campaign, Operation Allied Force, against Yugoslavia lasted from Mar. 24 until June 10, 1999. Many questioned its legality under U.S. or International Law. Tom Campbell, Member U.S. House of Representatives v. William Jefferson Clinton, President of the United States, 203 F.3d 19 (US Court of Appeals, D.C. Circ., 2000); Walter Gary Sharp, Jr., *Operation Allied Force: Reviewing the Lawfulness of NATO's Use of Military Force to Defend Kosovo*, 23 MD. J. INT'L L. & TRADE, 295 (Spring/Summer 1999); Louis Henkin, Ruth Wedgwood, Jonathan I. Charney, Christine M. Chinkin, Richard A. Falk, Thomas M. Franck, W. Michael Reisman, *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L., No. 4, at 824 (Oct. 1999).

<sup>126</sup> See Maj Nancy Richards & MSgt Jack L. Craft, *JA's Role in Assessing Collateral Damage*, JAG WARRIOR, Vol. III, Issue 1, at 3 (Spring 2000). Majors Dales and Eflein experienced the difficulty of working with 19 nations and wrote:



targets included Serb artillery, field headquarters, government ministries, refineries, military vehicles and formations, air defenses, military and police headquarters, and supply routes.<sup>127</sup> In spite of efforts to limit collateral damage, about 500 civilians were killed and 820 wounded.<sup>128</sup> Incidents causing criticism included bombing the Chinese Embassy and a Belgrade radio and television station, attacks that released chemical pollution from factories, an attack on a civilian convoy, and bombs dropped on a railroad bridge that struck a passenger train.<sup>129</sup> In what may be considered a "media trial," NATO officials were indicted and tried in Belgrade for war crimes.<sup>130</sup>

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The method by which targets were selected, reviewed and approved had more of a political flavor than is normal in an operation, because not one, but 19 "NATO White Houses," had to agree on individual targets. Needless to say, getting 19 nations to agree on something doesn't happen quickly. After the initial group of 40-odd targets, we received targets in ones, twos or dozens as the North Atlantic Council (NAC) approved them. Because we never knew when to expect the targets, it was impossible to plan ahead to schedule TWG [target working group] meetings....A fascinating aspect of OAF [Operation Allied Force] was the multi-national political effect on targeting. When 19 nations must agree on something, there are bound to be political concessions made. The North Atlantic Council (NAC) dealt with most of the negotiating and concessions, but some of the concerns filtered down and had to be addressed at the CAOC [Combined Air Operations Center, in Vicenza, Italy]. Different nations had reservations about bombing particular targets, and these reservations had to be considered....One allied lawyer raised the issue of different national standards of determining "acceptable" collateral damage and how these views were considered in the legal review of targets. An effort was always made to satisfy allied concerns. Additionally, the CAOC had Senior National Representatives of the allied nations who could express their concerns, and each NATO nation was represented in the NAC.

Maj David Dales & Maj Dawn Eflien, *What Do Lawyers Do When the Bombs Start Dropping?*, THE JAG WARRIOR, Volume III, Issue 1, Spring 2000, at 5-6.

<sup>127</sup> See *Final Report*, *supra* note 5, at 5, 12-13. The report also points out that the U.S. and France have not adopted Protocol I.

<sup>128</sup> *Id.* at 14.

<sup>129</sup> *Id.* at 15-23; AI Report, *supra* note 3, at 21-55; Federal Republic of Yugoslavia website, *supra* note 6. Although NATO said the bombing of the Chinese Embassy was a mistake, Amnesty International felt the error showed NATO was not taking "sufficient safeguards in selecting and vetting targets for attack." Amnesty International also pointed out that after the accident, bombing was not halted to correct the errors that caused the accident. Defense Secretary Cohen pointed out that NATO flew about 18,000 missions and only about a dozen had unintended casualties. AI Report, *supra* note 3, at 37, section 5.6. Over 80 "civilian industrial facilities" were bombed, "causing serious if not irreparable environmental damage." Bostian, *supra* note 8, at 230; Schwabach, *supra* note 8, at 117. Note that the ICRC target list provided in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 632-633 (see appendix), allows the targeting of broadcasting and television stations. The destruction of the station was "aimed at disrupting and degrading the C3 (Command, Control and Communications) network. In the same night, radio buildings and towers,

### 3. Treaties and Conventions

Lessons from World War II were codified in the four 1949 Geneva Conventions,<sup>131</sup> protecting: the wounded and sick in armed forces in the field; the wounded, sick and shipwrecked in the armed forces at sea; prisoners of war; and, civilians.<sup>132</sup> The conventions say that hospitals and medical units, facilities, transports and aircraft are not to be attacked.<sup>133</sup> However the conventions do not specifically address bombardment, except to say prisoner of war camps and internment camps should have shelters from bombardment.<sup>134</sup>

After the Geneva Conventions, the next important conventions to show international law were the conventions to write and sign Protocols I and II during the 1970's.<sup>135</sup> Protocol I protects victims of international armed conflicts. Protocol II protects victims of non-international armed conflicts.<sup>136</sup> Protocol I is an effort to update or modernize the Law of War.<sup>137</sup> Parts apply to air warfare.<sup>138</sup> Some key provisions include: protection of the natural environment;<sup>139</sup>

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and electrical power transformer stations were bombed. NATO reported hitting these targets because the civilian and military communications networks used the same facilities. The bombing was also justified because the station was used for propaganda. This basis for the bombing proved controversial. *Final Report*, *supra* note 5, at 18-19.

<sup>130</sup> Just before their Presidential election, Yugoslavia tried 14 NATO leaders for war crimes, but none of the leaders attended the September 18, 2000 Belgrade trial. CNN, *Yugoslavia Puts NATO Leaders on Trial*, Sept. 19, 2000, available at [www.cnn.com](http://www.cnn.com); Serbia Info News, *Hearing at Trial of NATO Leaders Starts*, Sept. 18, 2000, available at [www.serbia-info.com](http://www.serbia-info.com).

<sup>131</sup> See Schindler & Toman, *supra* note 4, at 367.

<sup>132</sup> *Id.*, at 373.

<sup>133</sup> *Id.* See Geneva I, Art.s 19, 20, 35, 36, Geneva II, Art.s 22-25, 27, 38, 39, Geneva IV, Art.s 14, 18, 21, 22 and Annex 1.

<sup>134</sup> *Id.*, at 439, 527. Geneva III, Art. 23 and Geneva IV, Art. 88.

<sup>135</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts Protocol II). See Schindler & Toman, *supra* note 4, at 605.

<sup>136</sup> See Schindler & Toman, *supra* note 4, at 601. Protocol I was ratified by 140 nations, Protocol II by 131. The U.S. signed Protocol I but ratified neither. Schwabach, *supra* note 8, at 126; DeSaussure, *supra* note 23, at 49-50; OPERATIONAL LAW HANDBOOK 2001, *supra* note 19, at 52 n.8; Schindler & Toman, *supra* at 701. For the U.S. Government perspective on the protocols, see Michael L. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, AM. U.J. INT'L L. & POL'Y, Vol. 2:415, at 419 (1987). For an analysis of the Protocols, see Parks, *supra* note 22, at 63-225.

<sup>137</sup> See, Fenrick, *supra* note 42 at 550; Infeld, *supra* note 42, at 118.

<sup>138</sup> See Protocol I, Art. 49(3), reprinted in Schindler & Toman, *supra* note 4, at 650.

<sup>139</sup> *Id.*, Art.s 35(3), and 55, at 645, 653; ROGERS, *supra* note 20, at 108. The environment is also protected by the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, adopted by resolution of the U.N. General Assembly on December 10, 1976. See Schindler & Toman, *supra* note 4, at 163.

banning reprisals against civilians, cultural objects and places of worship; banning indiscriminate attacks; and, banning attacks against dams, dikes and nuclear power plants, if the attacks would cause "severe losses among the civilian population."<sup>140</sup> In its commentary to the protocols, the Red Cross also offered a model list of legitimate military objectives.<sup>141</sup>

### III ANALYSIS

#### A. Problems with the Status Quo

##### 1. Public Criticism

The Belgrade "media trial" was an attempt to use the media to gain public support. Criticism of NATO's role in the Balkans may make it hard for future coalitions to be effective.<sup>142</sup> Media and public criticism can harm a coalition's effectiveness because the perception of an illegal war or war crimes hurts public support.<sup>143</sup> NATO nations, as democracies, need to be conscious

<sup>140</sup> See Protocol I, Art.s 51(5), 51(6), 53(c), 56, 85(3)(b), and 85(3)(c) reprinted in Schindler & Toman, *supra* note 4, at 651; MCCOUBREY, *supra* note 20, at 178, 218 and 308.

<sup>141</sup> See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 632-633, reprinted in Parks, *supra* note 22, at 138. See Appendix for a copy of the target list. In the late 1980's and early 1990's, the next convention on the Law of War produced a manual for conflicts at sea. It did not cover rules for air war or bombing, but reaffirmed Law of War rules such as: distinction; military necessity; humanity; proportionality; banning indiscriminate attacks; and, avoiding civilian casualties and collateral damage. San Remo Manual on Int'l Law Applicable to Armed Conflicts at Sea, Prepared by Int'l Lawyers and Naval Experts, Convened by the Int'l Institute of Humanitarian Law, San Remo, Italy, Adopted in June 1994, available at [www.icrc.org](http://www.icrc.org), then "English," "Int'l Humanitarian Law," "Treaties IHL Database," "Introduction," "V," "V," "V," (last visited Feb. 9, 2001). The Manual resulted from a series of meetings starting in 1987, and it is intended to clarify the current law. Louise Doswald-Beck, *San Remo Manual on Int'l Law Applicable to Armed Conflicts at Sea*, available at [www.icrc.org](http://www.icrc.org), then "English," "Issues + Topics," "Int'l Humanitarian Law Topics," "Law of Naval Warfare," (last visited Feb. 9, 2001).

<sup>142</sup> The U.S. seldom fights without allies. The U.S., Great Britain, France and Russia allied in World Wars I and II. THE WORLD ALMANAC AND BOOK OF FACTS, at 507 (125th ed. 1993) [hereinafter WORLD ALMANAC]. In the Korean War, 20 nations aided the U.S.. ENCYCLOPEDIA BRITANICA, Vol. 13, at 467 (1973) [hereinafter ENCY. BRIT.]. Six nations joined U.S. troops in Grenada in Oct. 1983. WORLD ALMANAC, at 527. In 1991, 35 nations joined the U.S. in the Gulf War. WINNEFELD, *supra* note 116, at 145; Roger Normand & Chris af Jochnick, *The Legitimization of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J., at 387 (Spring 1994). The Dec. 1995 U.S. led Bosnia peacekeeping force had 60,000 troops from 36 nations. Wentz, *supra* note 119, at 3. In Kosovo, the U.S. acted with NATO. Peter Grier, *Airpower Called Decisive in Kosovo*, A. F. MAGAZINE, Sept. 2000, at 16; Ruth Wedgwood, *NATO's Campaign in Yugoslavia*, AM. J. INT'L L., Vol. 93, No. 4, Oct. 1999, at 828; Dales & Eflien, *supra* note 126, at 5.

<sup>143</sup> See MCCOUBREY, *supra* note 20, at 71-73; Keeva, *supra* note 22, at 55; Parks, *supra* note 22, at 81. Former North Vietnamese commander Bui Tin commented on the Vietnam War,

of public support. The U.S. must also maintain its historically good reputation. If this reputation suffers, it may limit the formation and actions of future coalitions.

Public criticism can affect public opinion and support for NATO or U.S. military operations. This is a political problem that may limit the military options available. Additionally, as the International Criminal Court develops, public criticism may compel nations to raise specific cases against NATO or the U.S. before the court. So, public criticism may affect public opinion and force legal problems later; especially as the public expects "perfect" wars.<sup>144</sup>

Public perceptions are important in modern war. During Kosovo operations, Milosevic used the media to battle NATO in the airwaves. He let the BBC and CNN broadcast, in his efforts to affect western public opinion.<sup>145</sup> Some felt that his use of the airwaves made his TV and radio stations legitimate NATO targets.<sup>146</sup>

An Amnesty International (AI) report listed problems with the Kosovo campaign. AI found friction within NATO over if the Belgrade radio and TV station was a legal target, saying the British and French refused to bomb it.<sup>147</sup> AI called the attack a war crime.<sup>148</sup> AI was critical of a bridge blown up during the day instead of at night when there would be less traffic,<sup>149</sup> attacks that hit hospitals,<sup>150</sup> the Chinese Embassy attack,<sup>151</sup> and other incidents. The attack on the embassy resulted from poor intelligence. But, NATO also bombed a Kosovo Liberation Army (KLA) barracks; based on old information it was a Serbian Army barracks. This accident was after both the KLA and the Organiza-

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saying, "The conscience of America was part of its war-making capability, and we were turning that power to our favor. America lost because of its democracy; through dissent and protest it lost the ability to mobilize a will to win." *Quoted in* Col Charles J. Dunlap, Jr., *How We Lost the High-Tech War of 2007: A Warning From the Future*, WEEKLY STANDARD, Jan. 29, 1996, at 24 [hereinafter Dunlap-2007]. Dunlap's article is an interesting fictional account of a leader in 2007 explaining how they won a war against the U.S.

<sup>144</sup> Michael Ignatieff points out that since the Gulf War, precision strikes are now expected and the "...Western public has come to think of war as laser surgery...We routinely demand perfection from the technology that surrounds us - from our cell phones, computers and cars. Why not from war?" See Michael Ignatieff, *The Virtual Commander: How NATO Invented a New Kind of War*, THE NEW YORKER, Aug. 2, 1999, 30-36, at 30.

<sup>145</sup> See Michael Ignatieff, *Balkan Physics*, THE NEW YORKER, May 10, 1999, 69-80, at 75.

<sup>146</sup> *Id.*, at 75-78. Ignatieff also points out the moral conflicts of "high-tech war." Should modern military missions protect innocent civilians or military fighter pilots?

<sup>147</sup> See AI Report, *supra* note 3, at 10, 12, 33. AI reported NATO nations could each decide what part of the NATO ROE to adopt, and had different treaty obligations and different standards of humanitarian law.

<sup>148</sup> *Id.*, at 31.

<sup>149</sup> *Id.*, at 34-35, 41-42.

<sup>150</sup> *Id.*, at 35-37, 42-44.

<sup>151</sup> *Id.*, at 14, 37-38. AI was also critical of NATO's use of cluster bombs and depleted uranium rounds.

tion of Security and Cooperation in Europe (OSCE) reported to NATO for about a month that it was in KLA hands.<sup>152</sup>

The perception of war crimes may result from a lack of public understanding of the Laws of War and increased media attention and intense criticism of "questionable" missions such as the bombing of the Belgrade radio and TV station. The media is more important because modern coverage means disagreements between coalition leaders can be magnified, and air strikes and collateral damage can be broadcast live worldwide.<sup>153</sup> This has increasingly meant any level of collateral damage is too high.<sup>154</sup> The public is less willing to accept military or civilian deaths in military operations.<sup>155</sup> With improved technology and the increased use of "smarter" weapons, the public standard may soon be perfection.<sup>156</sup>

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<sup>152</sup> *Id.*, at 15-16, 53-55.

<sup>153</sup> See WINNEFELD, *supra* note 116, at 275.

<sup>154</sup> See Ignatieff, *supra* note 144, at 30.

<sup>155</sup> Civilian deaths are used by the enemy and shown in the world media. The U.S. is reluctant to have any military deaths. Dunlap points out "The deaths of 18 American soldiers in Somalia-followed by the telecast of a U.S. soldier's body dragged through Mogadishu's streets-caused a public outcry that forced a humiliated America to forsake its policy objectives." The possibility of casualties in Bosnia delayed a response in the 1990s, "despite the occurrence of outright genocide." Dunlap-2007, *supra* note 143, at 24. In Kosovo operations, the U.S. was upset when the U.K. said NATO had to consider ground troops. Eventually, NATO won without ground troops in combat. Allan Little, *Behind the Kosovo Crisis*, Brit. Broadcasting Co., Mar. 12, 2000, at 4-7, available at <http://news.bbc.co.uk> then "World," "Europe," "Country Profiles," "Yugoslavia," "Special Report," "Kosovo Conflict," "Crisis Background," (last visited Feb. 9, 2001)[hereinafter BBC]. Even training deaths by natural causes cause controversy for the U.S. military, such as Air Force trainee Micah Schindler's death. Sig Christenson, *Lackland Reviewing Training: Changes are made in Wake of Death*, SAN ANTONIO EXPRESS-NEWS (Tex.), Sept. 14, 1999, at 1A, and follow-up news on Sept. 15, 26 and 29 at 1B, 6G, and 1A, Oct. 10, 13 and 15 at 6J, 6B, and 1A, Nov. 17 and 27 at 1A and 1B. A survey by Feaver and Gelpi finds U.S. government officials have more "casualty aversion" than the general public. They suggest officials felt the "CNN effect" in Somalia and pulled out while "...Americans would have tolerated an expanded effort to catch and punish him [Mohamed Farah Aideed]." Peter D. Feaver and Christopher Gelpi, *A Look At...Casualty Aversion: How Many Deaths Are Acceptable? A Surprising Answer*, WASH. POST, Nov. 9, 1999, Outlook, page B3.

<sup>156</sup> Wars since Vietnam have used more "smart" weapons. This may form a legal "custom" requiring them. *But see*, Infeld, *supra* note 42. NATO must not suggest the weapons are costly, and may bill the enemy for the weapons. In future wars, NATO should seize enemy assets to pay for war costs. After Iran seized the U.S. embassy in 1979, \$14 billion in Iranian government assets in the U.S. were frozen. Later, laws let victims of Iran's "sponsored terrorism" sue in U.S. courts for the funds, with initial payments made by the U.S. government. See *U.S. Government to Pay American Victims of Terrorism*, Oct. 22, 2000, at [www.cnn.com/2000/US/10/22/terrorism.damages.ap](http://www.cnn.com/2000/US/10/22/terrorism.damages.ap), and *Iranian Files Suit to Free Assets Frozen in U.S.*, Nov. 14, 2000, at [www.cnn.com/2000/WORLD/meast/11/14/iran.usa.reut/](http://www.cnn.com/2000/WORLD/meast/11/14/iran.usa.reut/) (both last visited Nov. 22, 2000). If NATO plans to bomb an enemy military target, we can use "dumb bombs" risking lives and property; or, the enemy can use cash or even frozen assets to buy smart weapons for less collateral damage. It may be best to buy accuracy, but the enemy can save money by moving civilians from the target area and accepting the greater collateral

In the Gulf War, Saddam Hussein showed the world how to use the vast destruction caused by U.S. air strikes against the U.S. Future enemy leaders, willing to sacrifice their military, people and infrastructure, may follow his example, especially since Milosevic has also shown it to be effective. Others may follow the example of the Viet Cong in Vietnam and get U.S. air strikes to destroy civilian areas. Current U.S. targeting philosophy accepts collateral damage deaths if the military attempts to strike a lawful military target.

Hussein, Milosevic and others have and will continue to use collateral damage deaths against the U.S. in the war of public opinion.<sup>157</sup> Nations portray themselves as "innocent" victims of U.S. power.<sup>158</sup> Leaders may even welcome or create collateral damage deaths as a tool for public relations.<sup>159</sup>

It is not just enemies who condemn the U.S..<sup>160</sup> During and after the Gulf War, it was the media, Human Rights Watch, Amnesty International, and civilians, including former U.S. Attorney General Ramsey Clark. It is not just criticism of one conflict. When many accuse the U.S. of mistakes and war crimes in different operations, it affects public opinion and should cause us to review our strategies. The Gulf War and the Kosovo operations may become linked in people's memories as "the two most recent examples of abuse of U.S.

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damage caused by "dumb" bombs. The enemy is responsible for civilians and the location of their military targets. The enemy may offer to destroy the target themselves, at a fraction of NATO's cost. Precision munitions can be expensive. Bombs cost from \$50,000 to \$100,000 each, with cruise missiles running around \$1.35 million. See Infeld, *supra*, at 131.

<sup>157</sup> For examples of how Iraq and Yugoslavia use collateral damage, see the Permanent Mission of Iraq to the United Nations, New York at [www.iraqi-mission.org/iraqbackup.htm](http://www.iraqi-mission.org/iraqbackup.htm), then click "U.S. War Crimes" and the Federal Republic of Yugoslavia site at [www.gov.yu](http://www.gov.yu), then click "Aggression Against FRY." (Both sites last visited Feb. 12, 2001.)

<sup>158</sup> Iraqi uses many of the collateral effects of the Gulf War in an effort to end economic sanctions. A search at [www.yahoo.com](http://www.yahoo.com) found eight groups working against sanctions. But, they do not focus on the Iraq's development and use weapons of mass destruction, Iraq's repression of Kurds and others, or Iraq's holding over 600 Kuwaiti prisoners of war. The Permanent Mission of Iraq, *supra* note 157; [www.yahoo.com](http://www.yahoo.com), then "Countries," "Iraq," "Government," "Politics," "U.S./U.N. Conflict," "Economic Sanctions" (last visited Feb. 12, 2001); Kuwaiti Embassy web site at [www.Kuwait-info.org](http://www.Kuwait-info.org), then click "Kuwaiti POWs" (last visited Feb. 12, 2001); IRAQ UNDER SIEGE: THE DEADLY IMPACT OF SANCTIONS AND WAR (Anthony Arrove ed.) (2000); Tom Heinen, *Saddam's Legacy*, MILWAUKEE JOURNAL SENTINEL, Aug. 6-8, 2000.

<sup>159</sup> During Kosovo operations, people in Belgrade massed on bridges "carrying candles and wearing target signs" to discourage and protest NATO strikes. MICHAEL IGNATIEFF, *VIRTUAL WAR*, at 138 (2000). It has also been suggested that a future enemy might detonate a nuclear bomb in their own territory and blame the U.S., in order to gain public opinion support. Dunlap-2007, *supra* note 143, at 26.

<sup>160</sup> When an enemy accuses NATO or the U.S. of war crimes, I recommend an active response. Ask the enemy or the world community to outline an appropriate response to the evil NATO or the U.S. faces. NATO and the U.S. could also ask the ICRC to help negotiate proper bombing targets. In some ways, the ICRC would have to support NATO's actions, rather than allow the evil to continue. Kosovo is a great example. While Milosevic could try and explain or excuse his ethnic cleansing in Kosovo, there is no appropriate reason to support his actions. The ICRC would be forced to support the humanitarian effort to stop the genocide.

military power." This is especially true as the years pass and the veterans die as such righteous wars as World War I and II fade into the background of long ago history.

While the Gulf War seemed righteous, it generated a lot of criticism; even with attorneys advising commanders.<sup>161</sup> One criticism was that more "smart" weapons were not used.<sup>162</sup> Critics found fault with daytime bombing of bridges that killed civilians, and with air strikes on military hospitals, food plants, agricultural storage centers, an air raid shelter, water treatment facilities and electrical power plants.<sup>163</sup>

If the U.S. considers the public criticism and the importance of public opinion, the U.S. is caught in several dilemmas. Should the U.S. cause devastating destruction to win a war quickly with a minimum of U.S. deaths? This could be an attempt to win while public opinion supports the military action. But, this risks accusations of war crimes and negative public opinion over our tactics and vast destruction. Should the U.S. react in a slower fashion, acting more carefully? This risks allowing a problem, such as ethnic cleansing, to continue. Meanwhile, public opinion may move away from military support.

After a war is over, the U.S. can either aid the people we fought, or leave behind devastation to be used against us in a worldwide media campaign. Or, should the U.S. do nothing in the face of genocide and evil? This leads to criticism for failure to act, or for failure to act sooner, as in the genocides, mass killings and crimes against humanity in Nazi Germany, Rwanda, Bosnia, Kosovo, Cambodia and other places. However, adoption of a target list by NATO nations could diffuse criticism of NATO targets in future conflicts and allow a sufficiently rapid response.

## 2. Dissent within Coalitions

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<sup>161</sup> See DeSaussure, *supra* note 23, at 58-59.

<sup>162</sup> *Id.*, at 60-61; Infeld, *supra* note 42, at 109; HUMAN RIGHTS WATCH, *supra* note 2, at 5-6.

<sup>163</sup> See CLARK, *supra* note 2, at 42, 59-84; HUMAN RIGHTS WATCH, *supra* note 2, at 4-11. Normand and Jochnick have unique criticisms of the war they see as one of the "most unbalanced applications of military force in history." The Coalition's power means it "...must be held to a higher standard of conduct" in protecting civilians. Coalition leaders caused incredible amounts of destruction in Iraq. They bombed 16 of 18 main power stations, striking one 13 times, the last time "minutes before the cease-fire," reducing "Iraq's electrical output to less than four percent of the pre-war capacity, creating conditions for a public health catastrophe." The attacks were not necessary since Iraq's military had generators; and, the Coalition did not bomb plants in Kuwait, which supplied the Iraqi military there, until just before the ground war. There is a question about if the Coalition ever bombed Kuwaiti power plants, which were only damaged enough to reduce output by 5-7% of pre-war capacity. The Coalition destroyed Iraq's oil industry, going well beyond what was needed in the war. After destroying central TV and microwave facilities, the Coalition repeatedly struck useless local facilities. The Coalition destroyed civilian product factories, bombing until the cease-fire. Normand and Jochnick see a "consistent historical pattern," that the Laws of War are "deliberately structured to disregard humanitarian considerations." Normand & Jochnick, *supra* note 142, at 400.

Outside criticism of U.S. led coalitions is highlighted and worsened by dissention within the coalitions. Coalition nations make difficult decisions during military operations. The targets in the Gulf War and Kosovo highlight one of the most difficult questions in bombing. Should targets be bombed when they have both military and civilian uses? These targets are often called "dual use" or "mixed use" targets.<sup>164</sup> The U.S. position is that a target that has a military use is a proper subject of attack, so power plants are bombed to deprive the enemy military of power for radar stations, radios, communications, and manufacturing.<sup>165</sup> However, the destruction of a power plant may also affect civilian hospitals, food supplies, and water treatment.<sup>166</sup> If there is doubt about a target, such as a school, church or home, it is "presumed to have no military purpose."<sup>167</sup>

All U.S. allies do not share U.S. views on dual use targets.<sup>168</sup> For example, after the Kosovo bombing operations, French President Chirac told a

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<sup>164</sup> See Maj C. B. Shotwell, *Economy and Humanity in the Use of Force: A Look at the Aerial Rules of Engagement in the 1991 Gulf War*, 4 USAFA J. LEG. STUD., at 24 (1993); Davis, *supra* note 110, at 602.

<sup>165</sup> See Shotwell, *supra* note 164, at 24.

<sup>166</sup> Collateral damage (harm to civilians or their property) analysis focuses on the damage at the time of the bombing, a short-term view. Gulf War critics showed short and long-term effects of collateral damage, perhaps worsened by UN sanctions and Saddam Hussein's decisions. Human Rights Watch pointed out:

The nation's electricity dependent water purification and sewage treatment facilities were crippled, creating a serious health hazard. Hospitals and clinics were forced to meet this growing health emergency, and to treat the war wounded, with, at most, erratic electricity supplied by back-up generators. Vaccines and medicines requiring refrigeration deteriorated and were difficult to replace. A UNICEF representative in Iraq noted in late May the "vicious circle" of "poor hygiene, contaminated water and poor diet," which he said left about 100,000 Iraqi children under one year of age vulnerable to diarrhea and dehydration.

HUMAN RIGHTS WATCH, *supra* note 2, at 9-10.

<sup>167</sup> See Shotwell, *supra* note 164, at 24.

<sup>168</sup> At the US Army JAG School, I heard U.S. allies had different views about bombing dual use targets. This was hard to document. A JAG pointed out few nations want to issue doctrine to limit targeting options in future conflicts. A professor suggested speaking with foreign JAGs. I then interviewed foreign legal advisors.

A Canadian JAG pointed out that they take a practical approach and would strike the Belgrade TV station, but would not bomb a water purification plant or air raid shelter that served both military and civilians. Canadians focus on getting the best and most current intelligence information. In their Army, they must see the target before destroying it; and in a similar fashion, the Air Force demands the best intelligence information available before bombing. They would not destroy a bridge that had any civilian vehicles on it.



reporter that Chirac protected bridges in Belgrade.<sup>169</sup> U.S. Army General Wesley Clark, military commander of the allied campaign, spent the conflict coordinating target approvals between NATO nations. Eventually he gained more control, but maintained a target team for NATO aircraft, and one for U.S. aircraft.<sup>170</sup> This let him use U.S. aircraft for missions that other NATO nations refused.

While General Clark was coordinating target approvals, one of his key officers had a different targeting concern. U.S. Air Force General Michael Short, head of the air campaign, felt NATO was mistakenly focusing on tactical targets instead of striking strategic targets. He said "There were a couple of times when I felt I just can't do this any more. We're just not doing this right and I owe it to my people to stand up and say we're just not doing this right." He asked for permission to bomb strategic fixed targets in Serbia instead of hunting for mobile small targets in Kosovo that were difficult to find. The BBC reported, "The general blames the politicians for allowing public opinion to dictate military strategy. He also blames the nature of NATO. 'This was my first time going to war with 19 partners,' he says, adding: 'It was war by the lowest common denominator.'"<sup>171</sup>

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A German attorney said their military was very concerned about the political aspects of targeting decisions; in part because of German actions during World War II. The German people were very sympathetic to the citizens of Belgrade who lost their electric power. The German JAG pointed out that the German military is probably close to the U.S. in its targeting views, but the Germans would not destroy a water purification plant used by both military and civilians.

A JAG from Australia said that military leaders must consider public opinion and create policies that are supported by the public and troops. They did not want to kill women or children or destroy illegal targets that would offend enemy civilian leaders. Any bad press about targeting would affect Australian political leaders. The JAG pointed out that political concerns and proportionality were more important in Australian analysis than in U.S. analysis. The example we discussed was the power plant supplying military and civilian users. The Australians would not destroy the plant, even though U.S. forces would bomb it. The Australians would find a creative way to target the specific power transmission lines supplying power to the military. The JAG also pointed out that Australians were reluctant to strike bridges.

These comments highlighted and documented the problem of different interpretations of targeting and the Laws of War. See Ignatieff, note 144, at 30-34; Dales & Eflien, *supra* note 123, at 5-6.

<sup>169</sup> See Ignatieff, *supra* note 144, at 34.

<sup>170</sup> *Id.*, at 30-34. Gen. Clark's difficult target coordination may have led to a recommendation in DoD's Jan. 1, 2000 After Action Report that DoD work to improve the "NATO Political-Military Process." See *War in Europe: NATO's 1999 War Against Serbia over Kosovo*, Frontline, available at [www.pbs.org/wgbh/pages](http://www.pbs.org/wgbh/pages), then "Frontline," "Shows," "War in Europe," "Readings," "Operation Allied Force After-Action Report" at 2 (last visited Feb. 9, 2001).

<sup>171</sup> See *NATO Leadership Splits Revealed*, Brit. Broadcasting Co., Mar. 9, 2000, at 1-3, available at [news.bbc.co.uk/1/english/world/europe/newsid\\_671000/671420.stm](http://news.bbc.co.uk/1/english/world/europe/newsid_671000/671420.stm) (last visited Feb. 9, 2001). BBC and Frontline reports show U.S.-U.K. tensions, because Prime Minister Blair felt ground troops would be needed. Short said French pressure meant early bombing campaign targets had no strategic importance. The requirement for all 19 NATO nations to agree

Dissension within NATO is a political problem that serves to limit military options. It may also become a legal problem if the Law of War changes the standards for bombing and those higher standards are enforced in the International Criminal Court, or if NATO dissension is used as evidence in the International Criminal Court of war crimes by individuals.<sup>172</sup>

Friction in NATO may have been a reason for European Union (EU) consideration of a 60,000-man rapid reaction force.<sup>173</sup> If the EU has a military force, they may not need to join future U.S. led coalitions. An EU force may make it harder for the U.S. to build future coalitions, especially since NATO is not needed for its original Cold War mission. Adoption of a target list by NATO nations before a conflict may reduce NATO dissension during a conflict.

### 3. *Slow Process*

One of the problems in NATO operations in Kosovo and Bosnia was the slow targeting process. General Clark's consultations with NATO leaders over targeting for Kosovo operations are the most current example.<sup>174</sup> It ap-

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meant they "were fighting a war by committee-and moving at the pace of the slowest member." Other difficulties in NATO concerned letting Russian troops take the Pristina airport. *See also, War in Europe: NATO's 1999 War Against Serbia over Kosovo*, Frontline, available at [www.pbs.org/wgbh/pages](http://www.pbs.org/wgbh/pages), then "Frontline," "Foreign Affairs/Defense," "War in Europe," "Web Site," "Interviews with Policy Makers, Analysts, and Military Leaders," and "General Michael C. Short" (last visited Feb. 9, 2001).

<sup>172</sup> One of the most controversial Kosovo campaign targets was the TV station bombed April 23, 1999. British attorneys argued the Geneva Conventions banned targeting reporters or TV stations, so the British did not participate in the attack. French objections to the target postponed the attack. AI Report, *supra* note 3, at section 5.3. The bombing is discussed in Final Report, *supra* note 5, at 18-21, but the committee did not recommend further investigation. The attack is called a "war crime" by two of the people who commented at the BBC site, *Kosovo: Is NATO Guilty of War Crimes?*, *supra* note 6. Yugoslavia felt NATO leaders committed war crimes. *See* CNN and Serbia Info News stories, *supra* note 130. One of the concerns about the International Criminal Court is that it might try American soldiers for war crimes. Ambassador David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective On The International Criminal Court*, 167 MIL. L. REV. 1, at 9 (Mar. 2001). *If* the International Criminal Court was fully operational before April 1999, *and if* President Clinton, Gen Clark or Gen Short were indicted for the "war crime" of bombing the TV station, would British and French military officers and attorneys be called to testify about their specific objections? Would they be asked why they felt the attack violated International Law? We should expect both France and England to cooperate with the court. France has ratified the International Criminal Court treaty and the United Kingdom is "moving toward ratification." Scheffer, *supra*, at 4. This hypothetical question is offered to show coalition dissension may take on greater significance in the future.

<sup>173</sup> *See* Douglas Hamilton & Charles Aldinger, *Rival EU Force Could Hurt NATO*, *Cohen Says: Secretary Says Alliance Could Become a Relic*, WASH. POST, Dec. 6, 2000, at A28.

<sup>174</sup> "Clark often had to call Paris or Bonn to get European politicians or chiefs of staff to agree to a particular strike...When Clark found himself blocked politically, he would ring up Javier

pears NATO is moving back to a version of the Vietnam targeting process, with a myriad of slow steps and tight political control. However, instead of the U.S. President exerting control of the operation, NATO political leaders now fill that role.

Politics makes it hard to plan and run a war with 19 partners, each with a veto on targeting, tactics and rules of engagement, and each with different political concerns at home.<sup>175</sup> Adding UN leadership, control, coordination or supervision only complicates and slows the operation. The chance of error is increased when decisions must go through many layers, increasing delays, changes and refinements. When a target is finally approved, information may be outdated and the target may no longer be in enemy hands. Targeting delays hurt the effectiveness of NATO operations and put NATO soldiers at risk. Targeting delays are a military problem caused in part by the political process used to select and approve targets.

#### 4. *Cost of Rebuilding Nations*

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Solana, the NATO Secretary-General...and Solana would go to work on the member state that was objecting." Ignatieff, *supra* note 144 at, 34.

<sup>175</sup> Changing NATO's voting rules could also correct the problem of a veto by a single member. However, like the UN, NATO rules are fairly well entrenched and stable. Gen. Short said of NATO politics:

The political constraints existed throughout the conflict. There were targets that individual nations would not let us hit. There were targets that individual nations would not allow us to hit with airplanes launched from their soil. Or, there were targets that individual nations would not hit themselves, but it was okay for somebody else to hit. Apparently--it was relayed to me that every nation had a vote...What I believe is unacceptable is for one nation to veto a target set that other nations believe is important and then no-one can strike it...It allows in my mind, the interests of one nation to outweigh the interests of the alliance and the interests of the other 18 nations and as it turned out, again in my evaluation, this placed the aircrews at unacceptable risk and I believe prolonged the war by keeping key target sets off the table.

U.S. Secretary of Defense William Cohen also saw a political limitation and said,

There were political constraints that precluded the air force from carrying out and attacking those targets on a certain time frame. The problem was the political restraints that were exercised by the various members of the alliance...So we tried to be as aggressive as we could in saying let's move as quickly as we can to get these various targets. But it was hard to get that consensus until after the summit. We spent almost a month going through this process whereby NATO has never done this before. And so it was a real learning experience we had to go through in terms of getting the consensus and running various targets by leadership.

Frontline, *supra* note 171, interviews of "General Michael C. Short" and "William Cohen."

Accidental bombings, such as the destruction of the Chinese Embassy in Belgrade or the bombing of the KLA headquarters, can be very costly in many ways. It can affect the public opinion of the war, and the international relations of the warring parties with other nations and groups.<sup>176</sup> War has never been perfect; but, perhaps wars should be closer to perfect, just because of the cost. After World War II, the U.S. Marshall Plan rebuilt Europe, spending \$17 billion.<sup>177</sup> In Bosnia, peacekeepers are rebuilding war damage, at great cost, including damage caused by NATO. In November 2000, the U.S. renewed relations with Belgrade and promised to provide \$45 million in emergency food aid.<sup>178</sup> After many conflicts, the U.S. will aid former enemy nations to rebuild. The U.S. ends up paying for both the destruction and the renovation.

Because of the great cost of rebuilding, there is a strong argument to focus on only purely military targets. If NATO destroys only military targets, and refrains from striking "dual-use" targets, perhaps NATO will have less to rebuild after the war. There can be strong public opinion support to help a nation rebuild electric power plants and bridges, but less support for rebuilding military radar sites, military bases, military airfields and military headquarters. Creating massive destruction of civilian targets also gives an enemy a propaganda tool to use against attackers.

When faced with these dilemmas, perhaps the U.S. needs to be more creative and flexible in its response to evil and warfare.<sup>179</sup> We are essentially using the same bombing strategy that we started with in World War I, refined in World War II and tested in the Gulf War.<sup>180</sup> Perhaps a new strategy, such as a target list, can help guide us in future conflicts, to make warfare quicker, more humane and more efficient. Perhaps we can build NATO cohesion before the next war.

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<sup>176</sup> See IGNATIEFF, *supra* note 159, at 102.

<sup>177</sup> See ENCY. BRIT., *supra* note 142, at Vol. 9, page 605. The Marshall Plan, or European Recovery Program, aided 17 West European nations. U.S. generosity is so respected, it was satirically suggested that a nation should lose a war to the U.S., in order to get the aid sent afterwards. See LEONARD WIBBERLEY, THE MOUSE THAT ROARED, at 20, 26-28 (Bantam Books, 1971, story from the SATURDAY EVENING POST Dec. 1954-Jan. 1955 as *The Day New York Was Invaded*).

<sup>178</sup> See *Yugoslavia Restores Ties to U.S., Allies*, WASH. POST, Nov. 18, 2000, at A20; *Ceremony in Belgrade Formally Renews Relations with U.S., Others*, DAILY PROGRESS (Charlottesville, VA), Nov. 18, 2000, at A6. The German attorney I interviewed pointed out that the European Union is also repairing or replacing all of the bridges blown up in Belgrade during the bombing.

<sup>179</sup> For an example of a creative new approach to bombing, see Col Charles J. Dunlap, Jr., *The End of Innocence: Rethinking Noncombatancy in the Post-Kosovo Era*, STRATEGIC REVIEW, Summer 2000, at 9-17. His ideas are discussed in section III C.

<sup>180</sup> Holland points out we have used the same strategic bombing strategy since World War II. HOLLAND, *supra* note 40, at 39. However, our coalition partners sometimes limit us.

The high cost of rebuilding former enemies is an economic and political problem. This problem may properly cause NATO and the U.S. to review either their policies for targeting or the Laws of War for bombing and consider other less destructive options in the future. A pre-approved NATO model target list could be one way to reflect a new policy or promote a change in the International Law, through state practice.<sup>181</sup>

### B. Adoption of 1923 Air Rules

Since the Wright brothers flew on December 17, 1903,<sup>182</sup> there have been two consistent trends in U.S. warfare. First, the U.S. has increasingly used aircraft as a weapon as it developed from the first controlled flight to the ability to destroy cities.<sup>183</sup> Second, the U.S. seldom fights without allies. The key U.S. ally now is NATO, composed of multiple individual allies. NATO nations should adopt Articles 22 through 24 of the 1923 Air Rules as a basis for future bombing operations. NATO may also consider revisions to account for changes in war.

If the U.S. and NATO adopt these rules, they can build international law through practice and custom, while encouraging others to adopt the same rules. The U.S. is the most powerful military nation now, and usually works

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<sup>181</sup> Every conflict is different and limitations on targets to minimize rebuilding must be done with common sense. NATO may be able to limit bombing to "purely military" targets in conflicts such as Bosnia and Kosovo. These conflicts did not directly threaten any NATO nation and NATO had a vast advantage in military power. However, contrast those conflicts with the Gulf War, when a coalition fought a large Iraqi military force. In the Gulf War, a wider range of targets might be appropriate, besides just "purely military," even if the coalition tried to limit damage to minimize rebuilding. An overall strategy of limiting damage to minimize rebuilding would have been almost impossible for either the Soviet Union or Britain in World War II because of the limits of bombing accuracy and the fact that they were fighting a war of survival against a powerful enemy. If NATO adopts a policy of limiting destruction to "purely military" targets whenever possible, it should serve to help maintain the public opinion of NATO, enhance NATO member nation cooperation, reduce dissention within NATO, speed military targeting decisions and make rebuilding quicker and less expensive. A NATO policy of limiting destruction to "purely military" targets could also serve to maintain flexibility in international law. NATO could argue that a voluntary policy of limiting destruction is in effect a "Rule of Engagement" and not a reflection of NATO's interpretation of international law. NATO nations could point out that International Law allows a wider range of targets, but NATO is using "humanitarian restraint" whenever possible. This restraint should not then be used to limit bombing of appropriate lawful targets in future conflicts.

<sup>182</sup> See WORLD ALMANAC *supra* note 142, at 520.

<sup>183</sup> See BUCKLEY, *supra* note 3, at 220; ENCY. BRIT., *supra* note 142, Vol. 1, at 449. Since Vietnam, U.S. aircraft were used in Grenada, Panama, the Gulf War, Bosnia and Kosovo. Gulf War air strikes lasted from Jan. 17 until Feb. 28, 1991. The ground war was only from Feb. 24-28, 1991, because of the effective air war. See ANDREWS, *supra* note 115, at 28-71. In 1999 Kosovo operations, victory was won without sending in ground troops, after a 78 day bombing campaign. Grier, *supra* note 142, at 16; Wedgwood, *supra* note 142, at 828.

with NATO, the most powerful military alliance. The U.S. and NATO are in the best position to build positive custom in the international Law of War. There are many reasons for adopting these rules now.

By applying a consistent set of targeting guidelines for all U.S. and NATO operations, NATO can reduce criticism of the targets selected and be proactive in world public opinion. The 1923 Air Rules severely limit the legality of dual use targets. The target list in Article 24 (2) is strictly military in nature. This will eliminate some criticism. Article 24, parts (3) and (4) ban indiscriminate bombing and require a proportionality analysis. These rules can also prevent some criticism as they also limit attacks to purely military targets. Because the U.S. has precision munitions, the U.S. would often be able to bomb more targets than other nations, thus maintaining flexibility through the U.S. technological advantage.

Additionally, if the U.S. and NATO consistently follow the same rules, they will build consensus towards *opinio juris*. This gives the U.S. and NATO the opportunity to write international law through consistent and fair application of uniform standards in this area. Any critics will be forced to challenge an accepted position, NATO's unified legal front.

This will allow NATO to effectively respond to any world public opinion concerns. If NATO works consistently with the 1923 Air Rules, there will be a ready answer to critics; "All of the NATO nations have agreed to a unified humanitarian approach to bombing and apply that same approach. NATO's approach is completely consistent with current international law and the standards written in 1923." NATO will be able to set and enforce one standard. To work toward that standard, NATO might even consider getting the aid of the ICRC or the UN. If NATO adopted the 1923 Air Rules with the concurrence of the ICRC or the UN, then those organizations could help promote a unified world standard.

NATO unity is a key foundation. It is counterproductive to have different standards. If France or Britain or other NATO partners will not strike the same targets as the U.S., this allows for dissension and conflict within the alliance. Dissension allows NATO's enemies to further use public opinion and the media to reduce NATO resolve and ability to respond in a timely manner to crisis.<sup>184</sup>

Having one unified standard will also speed targeting decisions. If the 1923 Air Rules are adopted, NATO commanders, units and legal advisors could train and exercise with the same standards and a unified list. This will make real world targeting quicker. The specific rules will make some targeting decisions much simpler. A unified rule should also help reduce the political

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<sup>184</sup> Arguably, all of the NATO nations work from the same standards now, but with different interpretations. A specific target list could reduce the room for confusion or alternative interpretations.

nature of targeting. Targeting might be able to move towards a logical objective military discipline, and away from a politically charged and difficult subjective consensus decision.

Adopting and using the 1923 Air Rules will also improve one part of warfare, the rebuilding. As modern nations rebuild their defeated enemies, the 1923 Air Rules can be a real advantage. If NATO and the U.S. limit attacks to purely military targets, and avoid "dual-use" targets, there would be less to rebuild. If NATO destroys military barracks, and headquarters and factories, there may be no urgent need to rebuild those after the war. However, if NATO bombs water purification plants, power plants, communications centers and other dual-use targets, there can often be an urgent and compelling need to rebuild those facilities, at great expense. NATO destruction of a food warehouse has great propaganda value for the enemy. But, destruction of weapons storage facilities is less likely to sway public opinion or cause dissent within NATO.

Is it possible to remove all criticism from targeting? Is it possible to totally remove targeting from the influence of politics? No! However, we can and should improve our profession as much as possible and consider new ideas to do so.

There are many reasons why the 1923 Air Rules can work today. First, attorneys and military advisors already negotiated the rules, so there has already been input from those two groups. Second, the rules were agreed to by the delegations of six nations, five of whom are in NATO today, and the last is a leading world economic power.<sup>185</sup> This can be a strong foundation for getting the 1923 Air Rules adopted today. Third, the rules can be a starting point for an agreement within NATO to have all NATO operations controlled by one set of rules; regardless of the rules of engagement or treaty obligations of the individual NATO nations. This avoids any disagreements over Protocols I and II. Fourth, using one set of rules will avoid the problem of nations who have signed on to a coalition later declaring that missions violate international law. Fifth, adopting the rules now and considering revisions will build NATO cohesion now and for future coalition conflicts.

An alternative is to have NATO adopt the 1923 Air Rules as a matter of policy, and use the target list and guidance from those rules. NATO could use the target list for "police actions" or other minor interventions, while keeping the flexibility to return to the status quo ante. This would give NATO the benefit of working from a strong unified front, limiting dissention and building cohesion while also reducing the damage that needs to be rebuilt after the con-

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<sup>185</sup> The U.S., France, United Kingdom, Holland, and Italy are all NATO members. In 1996, Japan had the third highest national gross domestic product in the world. See WORLD ALMANAC, *supra* note 142, at 113, 866.

flict. However, if NATO or any NATO members needed to change their policy to meet a larger threat, they could do so without violating International Law.<sup>186</sup>

### C. Why 1923 Air Rules Are Better Than The Status Quo

The 1923 Air Rules were not adopted by any nation. Some see them as "an authoritative statement of the law as it then existed"<sup>187</sup> while others call them a failure.<sup>188</sup> The rules may have made a "significant contribution to the development of the modern rule of proportionality."<sup>189</sup> But others doubt they "have seriously influenced belligerent practice on any critical matter"<sup>190</sup> or see a "utopian quest to prohibit effective weapons or ban war."<sup>191</sup> Perhaps the most specific criticism is by W. Hays Parks. He called the rules a "total failure" and "unsuccessful" in drafting language "applicable to all nations, under all circumstances, and that would not provide a tactical or strategic advantage to one nation over another, nor establish rules for aerial bombardment that are fundamentally different from those applicable to land-based artillery or naval gunfire."<sup>192</sup>

Regardless of Parks' criticisms, the 1923 Air Rules are a valuable Law of War statement that can and should be adopted today. The current U.S.

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<sup>186</sup> This is using the 1923 Air Rules as "Rules of Engagement" for bombing campaigns. If a nation follows Rules of Engagement, they are not creating new International Law and can change their policy at any time as long as they are consistent with International Law. Rules of Engagement may show the level of force used or the constraints set by political concerns or military reasons such as the economy of force. ROGERS, *supra* note 20, at 58.

<sup>187</sup> MCCOUBREY, *supra* note 20, at 28. The draft has "the authority which the eminence of the jurists who prepared it naturally conferred upon it. Undoubtedly it has had influence upon the practice of belligerent and neutral Governments since the date it was formulated." SPAIGHT, *supra* note 69, at 42-43. The rules are a "useful guide to contemporary thinking about the state of customary law and have been described as persuasive authority in the context of land warfare." ROGERS, *supra* note 20, at 51. The rules are important to clarify and formulate the laws, but parts "appear rather rudimentary and are subject to serious doubt, at least from today's perspective." Fleck, *supra* note 57, at 43-44.

<sup>188</sup> Parks, *supra* note 22, at 31.

<sup>189</sup> Gardam, *supra* note 57, at 400.

<sup>190</sup> STONE, *supra* note 64, at 609.

<sup>191</sup> Jochnick & Normand, *supra* note 3, at 83-84. Jochnick & Normand say the jurists put "excessive faith in the power of positive law, they drafted rules that placed unprecedented limits on sovereign power and prohibited any effective use of aircraft in war." In 1925, Elbridge Colby, wrote of the rules, "We cannot put too much trust on rules." Colby quotes J. M. Spaight's comment that, "In air warfare more than in its elder brethren of the land and sea, the heart and conscience of the combatants are the guarantee of fair fighting, not any rule formulated in a treaty or in a manual." Colby, *supra* note 46, at 715.

<sup>192</sup> Parks blamed the "failed" rules on "international lawyers exercising the lead in negotiating a treaty in which they lacked subject-matter expertise." Parks, *supra* note 22, at 30-31. His 225-page article discusses the 1923 rules on pages 24-37, 71, 76, 103, 138, 164, and 224. His specific criticisms will be discussed later.



method of selecting targets is to analyze each for military necessity, humanity and proportionality. The U.S. uses a broad definition of necessity and strikes "dual use" or "mixed use" targets that some of our NATO allies will not attack.

The current U.S. method of targeting may be summarized as "everything may be destroyed if there is a military reason to destroy it." The targeting analysis considers the principles of humanity and proportionality and considers specific places are protected, such as churches, hospitals, and historical and cultural places. However, in this inclusive analysis, everything starts as a potential target.<sup>193</sup>

In the current U.S. analysis, a military headquarters is a target because destroying the enemy military will help our military succeed. However, the U.S. may also target the entire infrastructure that supports that headquarters, such as roads, communications systems, and power and water purification plants. If the roads, communications systems, or power or water purification plants also serve civilians, these "dual-use" items remain valid targets because destroying them will affect the enemy military.<sup>194</sup> The U.S. may also destroy any possible alternative sources of communications, power and water, to ensure the enemy military headquarters is isolated without support from the alternative sources. If the U.S. wants to isolate an enemy's military forces, it may destroy the main transportation routes used by the military and any possible secondary or alternate routes. The U.S. will often destroy routes that the enemy military has not yet used. The current U.S. targeting regime is "inclusive" and flexible in that almost everything starts as a potential target if there is any reasonable military necessity to destroy it.<sup>195</sup>

In contrast to the current U.S. analysis, the 1923 Air Rules may be seen as inflexible and exclusive. Both sets of analysis consider military necessity. The 1923 Air Rules focus on military necessity in Article 24 (1). But, the 1923 Air Rules become both inflexible and exclusive in Article 24 (2) when the rules say that if there is a military purpose "Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories containing important and well-known centers engaged in the manufacture of arms, ammunition or distinctly military supplies; lines of communication or transportation used for military purposes."<sup>196</sup> The listing of specific legitimate targets is effectively a short exclusive list that limits the consideration of "dual-use" targets.<sup>197</sup>

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<sup>193</sup> This description of U.S. targeting is an oversimplification to contrast the current regime with the 1923 Air Rules.

<sup>194</sup> "Dual-use" refers to possible targets that support both military and civilian infrastructure.

<sup>195</sup> Compare this simplified version of the U.S. view with the comments by foreign JAGs in footnote 168.

<sup>196</sup> Emphasis added. See Schindler & Toman, *supra* note 4, at 207.

<sup>197</sup> Perhaps the only "dual use" targets are factories that produce military and civilian items, and lines of transportation and communication used by both the military and civilians.

Because of this language and the list, under the 1923 Air Rules only the military headquarters and the lines of communication and transportation actually used by the military may be destroyed in the example. The attacker may not destroy the water purification plant or power plant used by both the military and civilians. The attacker may not destroy lines of communication and transportation that are not used by the enemy.

This example shows how modern U.S. practice may be seen as "inclusive" and flexible, while the 1923 Air Rules are "exclusive" and perhaps inflexible in limiting what may be considered legitimate targets. This limitation is an advantage. It should make targeting easier and quicker, while often limiting targets to those that should involve the least effect to enemy civilians and the least possible negative public opinion. The legitimate targets allowed by the Articles 22 and 23 of the 1923 Air Rules are primarily items that need not be immediately rebuilt after a war, except for possibly the lines of communication and transportation.

While U.S. analysis may be inclusive and the 1923 Air Rules are exclusive, they both still have the foundation of military necessity. The definition of military necessity in the 1923 Air Rules is similar to the definition in Protocol I, Article 52.<sup>198</sup> Protocol I has been ratified by most NATO nations, however, France and Turkey have not ratified it, and Italy, Holland and the United Kingdom have minor reservations about Article 52.<sup>199</sup> The U.S. accepts that many parts of Protocol I represent international law, and signed but never ratified the

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<sup>198</sup> Article 52 - General Protection of Civilian Objects:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Schindler & Toman, *supra* note 4, at 652.

<sup>199</sup> *Id.* at 652, 712. Italy's concern is that "the military advantage" gained from an attack should be considered when looking at the whole attack and not isolated parts. Italy, Holland and the United Kingdom point out that an area of land can be a proper military objective. Italy also points out that the first sentence of paragraph 2 "prohibits only such attacks as may be directed against non-military objectives. Such a sentence does not deal with the question of collateral damage caused by attacks directed against military objectives." Holland and the United Kingdom raise a concern that commanders have to make decisions based on the best knowledge available to them at the time.

treaty. If NATO and the U.S. adopt the 1923 Air Rules, the U.S. can possibly avoid some of the unresolved issues of U.S. concerns with Protocol I and work from a clean slate.

The "clean slate" of adopting the 1923 Air Rules will remove many "dual use" targets from consideration as targets. People see the U.S. view of targeting "dual use" facilities as providing flexibility in war. A criticism of the 1923 Air Rules is that it limits military objectives and legitimate targets to a "nation's military effort rather than its war effort."<sup>200</sup> The U.S. wants to strike "target systems" or a broader range of targets that contribute to a nation's ability to wage war, not just the direct functions of a nation's military forces. However an analysis of the 1923 Air Rules shows why they are acceptable, appropriate and better than the status quo of U.S. targeting.

The U.S. generally disagrees with the concept of a target list because it is too limiting or does not allow the attack of target systems.<sup>201</sup> The current U.S. strategy is to use air attacks to destroy "centers of gravity." Centers of gravity are concentric rings representing key areas of the nation. The outer ring is the fielded military forces. Moving inward, the other rings are population, infrastructure, key production or system essentials, and leadership.<sup>202</sup> Air strikes are often directed at the command and control of the leadership level, because that is the key to controlling all other parts of the model. This U.S. targeting and planning strategy was illustrated in the 1991 Gulf War.<sup>203</sup>

The 1923 Air Rules focus on striking military targets. Article 22 of the 1923 Air Rules bans bombing to terrorize civilians, to destroy or damage private property not of military character, or to injure non-combatants.<sup>204</sup> The prohibitions in this article seem consistent with recent U.S. practice. The U.S. does not intentionally do what Article 22 prohibits unless there is a valid military purpose for destruction of private property. But the U.S. and NATO could be creative within the limits of the 1923 Air Rules. One option is to focus only on military targets, as in the 1923 Air Rules, while working on other diplo-

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<sup>200</sup> Parks, *supra* note 22, at 138. Parks may "represent" a U.S. military view of the 1923 Air Rules and Protocol I because he is Chief, International Law Team, International Affairs Division, Office of the Judge Advocate General of the U.S. Army and because his article was presented in The Air Force Law Review. But, see Matheson, *supra* note 136, for a more official analysis.

<sup>201</sup> See Yoram Dinstein, *The Thirteenth Annual Waldemar A. Solf Lecture in International Law*, 166 Mil.L.Rev. Dec. 2000, at 104. and, Parks, *supra* note 22, at 138.

<sup>202</sup> See Lt Col Robert D. Pollack, *Roads Not Taken: Theoretical Approaches to Operation Deliberate Force*, in Owen, *supra* note 119, 431-453, at 435.

<sup>203</sup> See REYNOLDS, *supra* note 114, at 16-19; WARDEN *supra* note 110, at 39-40, 53-58, 129 (1988). Warden discusses targeting and air power. Early in the Gulf War, he wrote specific air campaign plans that were adopted as the air battle plans. Reynolds explains the planning process and Warden's work.

<sup>204</sup> This is consistent with Protocol 1, Art.s 51 and 52. Schindler & Toman, *supra* note 4 at 651.

matic measures or with ground and naval forces. Another option is to be creative with precision weapons. Instead of striking a power plant that supplies hospitals and the military, just strike the specific transformers and lines that supply the military. Or completely destroy the military facilities so they don't need or use power. As already noted, destroying dual use targets can have a negative affect on civilians and public opinion.

Do civilian targets have a value? Parks says in "land and naval warfare, destruction of civilian objects was regarded as lawful as a psychological means for impressing upon an enemy nation the prudence of surrender."<sup>205</sup> In the Civil War, General Sherman believed in causing economic hardships to those who supported the enemy. In the era of "total war" many air power theorists felt the morale of the enemy was an essential target of air power and bombing.<sup>206</sup> The argument is that a brutal war may be quicker, forcing surrender and discouraging future wars

The brutal warfare perspective ignores history. The U.S. has not gone to war against a democracy since the Civil War, a unique conflict. When the U.S. bombed Yugoslavia, Iran, or Nazi Germany, those nation's citizens did not have the freedom to vote their leaders out of office and the leaders ran the wars. Milosevic was only removed by an election and riots well after the Kosovo conflict was over. Hitler avoided assassination attempts and Hussein remains in power.

Perhaps the brutal warfare perspective or the focus on civilian morale can be combined with the use of precision weapons for a new strategy. Perhaps dictators should be the focus of precise bombing raids and attacks to force surrender. Air Force Colonel Charles Dunlap discusses this as a paradigm for the future. He says in Kosovo, Milosevic surrendered "because of the impact on the Serb people" when NATO hit Belgrade's power supply, bridges and military headquarters. Dunlap has historical examples of democratic nations devastating an "evil" nation and destroying the enemy's hostile spirit, with relatively few casualties.<sup>207</sup> He recommends a "new paradigm" of war directed at the civilian objects, especially luxury objects, of an enemy nation, to stop and discourage the "perpetrators of violent, misogynic policies." For example, NATO might have struck at Milosevic's bank account, destroyed banks and financial institutions, and perhaps even struck important cultural or religious buildings. Factories and stores "that produce, sell or distribute luxury products, or indeed, anything not absolutely indispensable to noncombatant survival, might be wonderfully rewarding targets."<sup>208</sup>

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<sup>205</sup> *Id.*, at 32.

<sup>206</sup> See BUCKLEY, *supra* note 3, at 74-82. See footnote 40 for Sherman's views, and footnote 77 for those of Trenchard, Gorrell, Douhet and Mitchell.

<sup>207</sup> Dunlap, *supra* note 179, at 9-14. His examples are Epaminodas in Sparta, Gen. Sherman's cut through the heart of the Confederacy, and Gen. Patton's campaign through Germany.

<sup>208</sup> *Id.* at 9-17.

Dunlap's ideas are creative and make sense on one level. It would be logical and humane to use a new kind of campaign focused on a dictatorship's elite leadership. NATO could limit collateral damage by using "smart" weapons and could announce which cities, areas or targets might be attacked each night, so civilians could evacuate. This kind of an attack would encourage powerful government leaders to stop the war because of their own direct personal interests. This kind of air campaign would have the potential to stop the violence in Kosovo, without killing those in Kosovo we wanted to help. These ideas are a way to apply the principles of humanity and unnecessary suffering in new and unique ways.

While these new ideas have potential, there are many limiting factors. NATO members can't agree on the Laws of War now. It could be hard to get agreement on a radical new strategy. In some cases a strong leader can motivate his citizens to withstand bombing or could even use enemy attacks to build citizen support of the war against the enemy.<sup>209</sup> Also, the effect of this strategy may depend on the dictator's strength or personal greed. If Milosevic was greedy and wanted to protect his property, or was weak and felt the push of the opinion of the leadership level of the population, he might cave in. However, Hitler or Saddam Hussein may have had enough brutal control of their nation to hold power for a long time. Of course, in the Gulf War, this strategy would allow the Coalition forces to destroy Hussein's many palaces and homes. Perhaps such a direct attack on his quality of life would have ended the war sooner.

Perhaps a strong leader in NATO, such as a Winston Churchill or FDR, could make Dunlap's concepts work. But, it seems few leaders in recent years are willing to boldly step forward and do what is right in the most difficult international situations.<sup>210</sup> Leaders often seem more responsive to public opinion and polls. Dunlap's new strategy could involve going against national or world

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<sup>209</sup> A survivor of the Battle of Britain told me Prime Minister Winston Churchill inspired the people to fight on, despite the bombing. Initially the German bombs fell heaviest in and near poor neighborhoods, which caused some dissension among the lower classes. But, then a bomb fell at one of the King's palaces and all of the population was united to resist together.

<sup>210</sup> It would have been wonderful for a world leader to say,

The killing in \_\_\_\_\_ [put in Rwanda, Bosnia, or Kosovo] is evil and can not be allowed. I am sending our military to end this genocide now. Local authorities can comply or be replaced. I regret that many will die in this noble effort. But, it is the right thing to do, and they will die for a just cause. We welcome allied help, but are starting now, before more are murdered. Thank you.

Instead of forceful direct action in those three areas, we were overly concerned about preventing any deaths of our citizens and allowed slaughter and rape of thousands or millions of others.

public opinion, or perhaps a leader would need to convince the public and other national leaders of the humanitarian nature of the new strategy.<sup>211</sup>

Dunlap's strategy would be counter to the general protections of civilian property. This restriction is in Article 22 of the 1923 Air Rules. Article 22 reflects much of what NATO does now, or could be seen as an appropriate pronouncement of a NATO consensus and a proper codification of air war rules.

Article 23 also reflects the current U.S. practice of warfare. Article 23 of the 1923 Air Rules bans bombing to enforce compliance with requisitions or forced contributions. Such actions would be condemned as blackmail or extortion today and are unnecessary because in some cases assets can be seized. Article 23 reflects current practices and is proper for NATO and world guidance for air war.

Article 24 starts with a concept key to U.S. warfare, the definition of "military necessity." Article 24(1) limits bombing to targets with a military objective, the destruction of which gives an attacker a military advantage. This reflects current practice and law. Critics point out that a strict reading of Article 24, parts (1), (2), (3) and (4) would limit bombing to the battlefield and prohibit bombing weapons factories or civilian factory workers.<sup>212</sup> Article 24(2) says bombing "cities, towns, villages, dwellings or buildings not in the immediate area of ground forces is prohibited."

There is no definition in the 1923 Air Rules of "not in the immediate area of." Certainly the area contemplated is beyond the battlefield but near the battlefield. However, this article may require interpretation through use. Should military supplies 25, 50 or 100 miles from the front be destroyed by air? Perhaps today's modern transportation technology will require an expanded understanding of where military targets may be bombed in relation to their proximity to the battlefield to apply this section. Perhaps the use of precision weapons should be an argument to expand the area considered in the area of ground forces. Another option is to warn the enemy of any attack that is not proximate to the battlefield. As modern warfare uses more missiles and remote aerial vehicles, a warning may not necessarily place any personnel in danger, even if it reduced the element of surprise.

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<sup>211</sup> Dunlap's strategy may or may not affect the cost of rebuilding after a war. Luxury or recreational property may not be urgently needed after a war and might not need to be rebuilt at all. The strategy also may require an expanded definition of "military necessity" because rather than attacking a target for a military purpose, the attack would be against the leadership elite's property.

<sup>212</sup> See Parks, *supra* note 22, at 32-33.

Warnings can also be used when considering the question of civilian factory workers. Attacking forces might warn the enemy of the attack or bomb at night to reduce civilian casualties.<sup>213</sup>

Parks has concerns about Article 24(2) and how it relates to targets and civilians. He argues Article 24(2) is so restrictive that many lawful targets from World Wars I and II would be unlawful under Article 24(2). He says the following World War I targets would not be allowed: "an aqueduct; blast furnaces; electric works; gas works; iron works and foundries; magneto works; motor works; steel works; and petroleum, oil and lubricant production, manufacturing, storage facilities."<sup>214</sup> Additionally, Article 24(2) ignores the role of civilians in the enemy's war effort.<sup>215</sup>

I respect Parks' observations, but disagree. Article 24(2) focuses attacks on military targets, military forces, military supplies, military factories, and, communications and transportation used for military purposes. This is a wide range of appropriate targets. If interpreted with reason and judgment it need not be unfairly limiting. However the focus on "military" will remove some dual use targets from consideration, especially when the Article 24(2) list of targets is read with the language of Article 24(1) saying that the object's destruction must "constitute a distinct military advantage to the belligerent."

While Article 24 will limit targets, Parks is focusing on World Wars I and II. Those wars, Korea and Vietnam were measured in years. But, most recent conflicts are measured in days or weeks.<sup>216</sup> Because of the short conflicts in Bosnia, Kosovo and Iraq, there would be no reason to bomb steel mills, civilian factories or motor works. If the U.S. bombed armament factories, we could cut off the production of weapons without destroying steel mills.

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<sup>213</sup> This guidance is in Protocol I, Article 57. See Schindler & Toman, *supra* note 4, at 654. In France in World War II, people were warned in radio broadcasts that the Allies would bomb factories. In Japan, when possible, people were warned to evacuate cities before incendiary raids. CRANE, *supra* note 76, at 43, 133. In Korea, U.S. forces dropped leaflets before an August 1950 campaign, to reduce casualties. HOLLAND, *supra* note 40, at 32. In Vietnam, before attacking civilian urban areas, the U.S. often warned with leaflets, loudspeakers or other means. Humphries, *supra* note 3, at 29. Israel used leaflets in 1982 to warn of bombings in Lebanon. Parks, *supra* note 22, at 165. Leaflets were used in the Gulf War to demoralize enemy soldiers, to warn them of B-52 raids, and to encourage them to surrender. ANDREWS, *supra* note 115, at 26-27, 41.

<sup>214</sup> See Parks, *supra* note 22, at 33.

<sup>215</sup> *Id.*, at 34.

<sup>216</sup> See WORLD ALMANAC, *supra* note 142, at 527. The U.S. attack on Grenada lasted just a few days. The invasion of Panama was over when Gen. Noriega surrendered 14 days after the attack. The Gulf War, Bosnian and Kosovo campaigns were 42, 21 and 78 days. Vietnam and the Somalia aid operation may have quelled any appetite in the U.S. for a long war. At the same time, U.S. military power is a unique deterrent.

Our usual complete air supremacy lets us strike most targets at will and repeatedly. So, we could strike any rebuilt armament plants.<sup>217</sup>

If the U.S. destroys the armament factories, and they are not in production, there is no reason to destroy the steel mills. If the U.S. destroys the military factories, and they are rebuilt in fortified structures, or are rebuilt in hidden unknown locations, then the steel mills may be the only appropriate way to strike and destroy the "military" industry that is supplying an ongoing war effort. The enemy is only leaving one available target with any military value. The enemy has turned the steel mill into a target that has a more direct military advantage, and perhaps made it the only target available to destroy to limit weapons production. If the U.S. or NATO were involved in such a situation, they should argue that the enemy, by its action has thus converted a "dual use" target into a more important and proper "military" target that should be bombed.

The difference between this analysis and the status quo of U.S. bombing is that in the present U.S. analysis, all dual use targets are almost always proper targets if they have any military purpose. In the above analysis, based on the 1923 Air Rules, striking the steel mill would only be a last resort that should only be allowed because of the enemy's actions to turn the steel mill into a "well-known center" building "arms, ammunition or distinctly military supplies."

Of course, when a conflict starts, it is impossible to predict how long it will last. If a war starts, the U.S. should focus on striking "military" targets first. However, if a war goes past months and into years, there may be good reasons to attack the steel mills that supply the military industries, depending on the facts of the conflict.

There is a similar analysis for "fungible" supplies such as oil. The analysis is to always strike the military resources first. Both civilians and the military can use petroleum products for vehicles. If the U.S. strikes the lines of transportation used by the military, the military forces may be isolated and immobilized. In Bosnia, a mountainous nation, destroying key bridges can isolate military vehicles. The U.S. could destroy the military vehicles and military depots or military oil storage locations. If these actions stopped military movements, then there would be no reason to destroy civilian oil products and storage facilities.

However, if the U.S. has struck lines of transportation used by the military, military oil storage and military vehicles, but the enemy military is still mobile, then civilian oil products and storage may become a proper military target that should be destroyed as a last resort. The oil could be properly de-

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<sup>217</sup> The language of Article 24 (2) allows bombing "factories containing important or well-known centers engaged in the manufacture of arms, ammunition or distinctly military supplies." Schindler & Toman, *supra* note 4, at 207.



stroyed once the military started using it, because then it would become part of a military depot or military supplies. Oil and other fungible commodities may belong to enemy civilians. However, once they start getting diverted for military use, these items become proper targets.

This is also a consideration with lines of transportation and communication. If the U.S. destroys roads used by the enemy, they may just turn to other routes, water transport or rail. However, Article 24(2) focuses on lines of transportation actually used by the military. If the lines are used, they are proper targets and probably should be considered as possible targets. If they are not used by the military, then there would be no military purpose served by their destruction. Current U.S. targeting practice is to quickly destroy all lines of transport and alternative routes.

The military purpose of attacking civilians is a hard problem. It has been suggested that if a civilian is driving an enemy military vehicle, then the U.S. or NATO should target the military vehicle and not the civilian. If the civilian is killed, they are a victim of "collateral damage" but we are not targeting them.<sup>218</sup> Of course, civilians are essential for the war effort. They have to provide so many things to support any military, such as food, water, supplies and weapons.

While civilians are important to support a nation's war, morality becomes a key factor. Does any individual civilian support the war? Do they support the war because of national propaganda? Are they forced to support the war with their work because it is a dictatorship? We can ask the same questions about the military. If we kill the military in the field, are we killing evil people who hate freedom, democracy and us? Or are we killing conscripts forced to fight for their country? Are we killing adult soldiers or children soldiers?

When facing these difficult legal and moral questions, the compromise of targeting the military targets and not the civilians makes sense. However, once the military targets have been destroyed, the enemy military may then take civilian resources or routes and convert them to military use. At that point, those converted materials and routes would become proper military targets. This is the key difference between the status quo of U.S. targeting and Article 24 of the 1923 Air Rules. The status quo of U.S. targeting wants to target alternate routes and alternate supplies immediately. Under the 1923 Air Rules, the civilian supplies and routes should not be struck until the military takes them over or uses them.

There is seldom a good reason to target a civilian or their property, unless we can destroy an evil leader, as the head of the enemy's military. The

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<sup>218</sup> Protocol I, Article 51 protects civilians from attack unless they take part in the hostilities. Therefore, they should not be targeted, but the military vehicle they drive can be targeted. The civilian driver's potential death should be considered when doing the proportionality analysis. ROGERS, *supra* note 20, at 8.

only other exception would be Dunlap's idea of striking civilian luxury items and wealth, however, the Laws of War are not that developed yet.

Article 24(3) limits bombing and protects civilians in another way. Bombing of "cities, towns, dwellings or buildings not in the immediate area of operations of land forces is prohibited." Even if there are proper targets in the cities, towns, dwellings and buildings, and the targets are in the immediate area of the operations of land forces, the targets may not be bombed if it causes the indiscriminate bombardment of the civilian population. This might be seen as an effort to restrict air warfare to the same range as naval gunfire or land artillery: to keep the devastation of warfare close to the front lines of the battlefield. Of course, this would ban "area bombing" or bombing attacks designed to affect the morale of the people

Morale warfare is a difficult topic. I respect Dunlap's arguments that the will of a people to go to war may need to be destroyed, such as Sherman's march to the sea. However, this is an area of mixed results in history. The morale of the German people in World War II was not effected enough to "win" the war. German forces had to be defeated, and Hitler had killed himself, before Germany surrendered. Bombing in Vietnam did not cause North Vietnam to give up. In some cases, a brutal dictator may have enough power to hold control, regardless of the suffering of their people, or bombing may stiffen an enemy's resistance.

There is a strong humanitarian argument to be made that in war we should destroy luxury property to cause an enemy nation to stop an evil act. However, this is an area where law needs to develop. It is unlikely there can be any good consensus for coalition operations in this kind of strategy. This may be something that the U.S. needs to test first, alone against an enemy. However, my focus here is on coalition operations, because that's where the U.S. has predominately fought in wartime in the recent past.

Most agree it is wrong to target cities, towns, villages, dwellings or buildings. We should target military objectives and not try and destroy the morale and lives of civilians, because it is wrong and reprehensible to do so, and also because it is ever more costly to rebuild the destroyed enemy afterwards if we have ruined their civilian infrastructure. There is often no need to rebuild a destroyed enemy's military, but we may feel compelled by humanitarian motives or public opinion or self-interest to rebuild their infrastructure, bridges, highways, homes, schools, churches, hospitals, businesses and civilian industry.

The rest of Article 24(3) says that when proper military targets are near the operations of land forces, the targets may not be bombed if it will cause the indiscriminate bombardment of the civilian population. This part of Article 24(3) makes more sense now than ever before. Because of precision weapons, we can strike targets with greater and greater accuracy, reducing collateral damage. Of course, nothing is perfect and there will always be collateral dam-

age. But, the focus in this area is still on the intent of the attacker. If U.S. forces thought they were striking a proper military target, but blew up the Chinese Embassy because of bad intelligence: we focus on their intent. The U.S. was not involved in indiscriminate bombing.

Incredible advances in reconnaissance have accompanied the great development of precision weapons. Satellites for navigation and reconnaissance have helped with finding targets, planning attacks, striking targets, and battle damage assessment. These advances have removed the need to burn down large areas to hurt an enemy's industrial base. We can now selectively amputate the military factories and buildings and plants we need to destroy. We can put a bomb in the middle of a bridge, with a low margin of error. Our increased accuracy means we can focus even more selectively on purely military targets and accomplish our mission. The advent of satellite technology and precision munitions has made the 1923 Air Rules more relevant today than they were when written.

Article 24(3) does not ban bombardment in towns; it limits any such bombing to prohibit indiscriminate attacks and to keep the attacks near the operations of land forces. It is a part of the 1923 Air Rules that makes much more sense today than it did when it was first written. Our technology has advanced so far that this article is completely appropriate to our weapons and technology.

Attackers are also not restricted to using "smart" weapons. There are other options to protect civilians and avoid indiscriminate bombing. Attackers can warn the enemy of an attack, and ask the civilian population to move from areas near military targets. This is often an appropriate step to protect the civilian population, but sometimes attackers are unwilling to risk giving advance notice because it places bomber crews at greater risk. However, if the attacker has reasonable accuracy and has warned the enemy, there should be limited loss of life from collateral damage. The attacker should make the warning loud and clear. This will reinforce the duty of the defender and civilians to protect civilian lives.

Article 24(2) is a target list, restricted by Articles 24(3) and (1). The U.S. has been reluctant to accept the idea of a target list. Professor Yoram Dinstein points out the U.S. "has consistently adhered to the position that the best thing to do is not have a binding list of legitimate targets for aerial attack."<sup>219</sup> The U.S. concern is that things change and if the U.S. wanted to bomb some target not considered in the past as valid, and not on the list, the U.S. would be prohibited from striking it.<sup>220</sup>

Dinstein points out that while this seems a valid argument, in fact the reverse has been happening. After each war, something the U.S. felt was a

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<sup>219</sup> See Dinstein, *supra* note 201, at 104.

<sup>220</sup> *Id.*

proper target has been removed from the list of accepted targets. After the World War II use of strategic bombing, Protocol I, Article 51(5)(b) and the further development of proportionality have taken this type of target away, and Dinstein says, "today, the bombing of Dresden would have been a breach of international humanitarian law."<sup>221</sup> It would also be a violation to consider a wide area, such as the industrial area of the Ruhr, as a valid target for bombing.<sup>222</sup> Some specific targets, such as dams, dikes and other installations, were allowed in World War II. But now it would be improper to strike them under Protocol I, Article 56(1).<sup>223</sup> It would also be improper to use defoliants, as the U.S. did in Vietnam.<sup>224</sup>

Dinstein shows that while the U.S. is against the idea of target lists as being too narrow and limiting in the future as things change, we have in fact lost several previously valid targets. In the Kosovo conflict there was criticism about the U.S. bombing bridges. In the future, the world community may remove bridges and other items from the realm of previously proper targets.<sup>225</sup> Dinstein concludes, "the best thing for the United States to do is to proceed to producing a binding list...All that is required is an open-ended enumeration of military targets that can be revised and updated in the years ahead."<sup>226</sup> If the U.S. starts the discussion, it may have some control or influence on how it turns out.<sup>227</sup>

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<sup>221</sup> *Id.* at 105. The bombing of Dresden would also be prohibited by the 1980 Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). The U.S. has not ratified this protocol, but does not object to it, and the President sent it to the Senate with a reservation that incendiary devices might be used when they cause less collateral damage than conventional weapons. An example might be that it is preferable to burn down a chemical weapons plant and destroy the weapons, than to bomb it with explosives and spread the weapons over a large area. So, Dinstein points out that incendiary weapons attacks, such as the bombing of Tokyo and Dresden, would also be prohibited under modern law.

<sup>222</sup> *Id.* at 106.

<sup>223</sup> Note that the U.S. has reservations about Article 56. Matheson, *supra* note 136, at 426.

<sup>224</sup> See Dinstein *supra* note 201 at *Id.* at 106. Defoliants are prohibited by the 1993 Chemical Weapons Convention, 32 I.L.M. 800 (1993).

<sup>225</sup> It is ironic to note that COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 allows the striking of both bridges and "the installations of broadcasting and television stations." Had the U.S. ratified Protocol I, it might use this target list from the commentary as an indication that it was proper to target the station and bridges. List *reprinted in* Parks, *supra* note 22, at 139.

<sup>226</sup> See Dinstein, *supra* note 201, at 107.

<sup>227</sup> *Id.* Because the U.S. is "fortress America" and the leader in many world military actions, it should consider a list. The U.S. will be the leader but "There is no alternative to military alliances, and they imply coalition warfare." The U.S. may be much better off to start and possibly control or guide the debate on target lists, than to continually have targets removed from the "acceptable" list. Dinstein says of the U.S. and target lists, "By being more pro-active, it can impact on international legal thinking and on the formation of legally binding roles that might prove more amenable to American needs."

Dinstein's argument for target lists is completely consistent with adoption of Articles 22-24 of the 1923 Air Rules. These rules contain an enumeration of targets. Since any list must be applied with common sense and judgment, this is a great start. Because the nature, weapons and strategy of war change, any list may need to be revised. However, after about 100 years of aircraft technology, it is time to have some specific rules on how to properly use this weapon.

In the development of the Law of War as it applies to ground, naval and air warfare, proportionality has been an important concept. This is expressed in Article 24(4) of the 1923 Air Rules. This article allows bombing of cities, towns, villages, dwellings and buildings in the immediate area of land forces when there is reason to believe that the military forces are strong enough to justify the danger to civilians.

This article makes sense when considering the dangers and realities of urban combat. If attackers are to take over a well-defended city, the battle will often move from house to house, block to block and street to street. There may be no way for attackers to take the city without bombing, and possibly the use of land artillery and naval gunfire. Article 24(4) is also an appropriate codification of the Law of War consistent with current NATO practice.

#### **D. Adopt 1923 Rules and Add Other Lists For The Future**

Because warfare changes, adopting Articles 22-24 of the 1923 Air Rules can only be a start. However, it could be done in several different ways. NATO nations could adopt the 1923 Air Rules as "rules of engagement" for minor conflicts or "police actions." This would allow for the creation and testing of a bombing list in coalition operations. If the 1923 Air Rules work well, the experiences in small conflicts may well prove that the rules can be effective in larger wars.

While using Articles 22-24 of the 1923 Air Rules in small conflicts would be a small step, it would be a start. Then military and legal experts can build from that foundation. We should consider revisions, alternate lists and alternative strategies. For example, when a nation can show it would be best to attack with the "Dunlap Plan," then they would bomb targets consisting of civilian luxury property. This type of warfare would be to protect human lives by destroying property that is not essential for humans, to compel a nation to do what is proper, correct and moral under international law. This could be a modern version of a "reprisal."

To advance the principles of humanity, necessity, distinction and military necessity, there will be other ideas worthy of consideration. There will always be other creative things to improve the Laws of War, if we are open-minded. Our open mindedness must of course be tempered with the realization that it can be difficult to get our allies to agree.

The development of the airplane and weapons and tactics for the airplane have advanced much faster than the Laws of War to control them. It is disappointing no specific treaty or convention exists yet to control this incredible weapon. Articles 22-24 of the 1923 Air Rules can be a proper foundation for continued moral and legal development.

Both weapons and war change. The U.S. has not faced a war with large armies on the field where the security of the U.S. mainland was threatened for over 130 years. Perhaps rules should be different for warfare when one side has an overwhelming advantage. Certainly the rules should not place U.S. military members in greater danger or risk their lives. However, perhaps the future Laws of War should serve to control the level of destruction the U.S. or a coalition brings onto a weak enemy nation and their people.

#### IV. CONCLUSION

Aircraft are an incredibly powerful and flexible weapon. We can destroy an entire city or cities with just one aircraft and strike anywhere in the world from the U.S.. However, in the history of the aircraft we have not yet developed specific uniform rules in the international Law of War for how to use this weapon. It is time to correct this deficiency.

In light of the difficulty of getting international treaties and conventions completed, NATO nations should agree to Articles 22-24 of the 1923 Air Rules as rules of engagement for small conflicts. This will allow for the development and testing of target lists. This small first step can be the start of a greater uniformity among the nations of this powerful alliance, and of the world.

Uniform guidance will build greater cohesion within NATO and let NATO plan for future wars and select targets quicker and with less dissension. It will reduce criticism from the world media and international organizations; criticism that can so terribly harm public opinion and support for NATO actions. Uniform rules will make NATO more effective and efficient as a military organization as it faces future conflicts. The recommended uniform rules of Articles 22-24 will also focus bombing on military targets and reduce the need for and amount of rebuilding after the bombing.

Articles 22-24 of the 1923 Air Rules are appropriate for how NATO fights today, and today's technology, and would be an effective first step at testing and setting proper international law controls of the use of aircraft in war. While Articles 22-24 would be a great foundation, it can only be a foundation. As we use aircraft in future wars, new tactics and weapons and situations will require new laws and rules. However, the world still needs that foundation in the Law of War on the proper use of the aircraft.

If Articles 22-24 of the 1923 Air Rules are effective as rules of engagement for small conflicts, then perhaps NATO nations can adopt them for

larger conflicts and consider a treaty incorporating these rules into international law for the future.

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CUSTOMARY PRACTICE AND US AIR FORCE TARGETING RULES  
COMPARED



*The Song of the Bomber* By Ethel Mannin

I am purely evil;  
Hear the thrum  
Of my evil engine;  
Evilly I come.  
The stars are thick as flowers  
In the meadows of July;  
A fine night for murder  
Winging through the sky.

From, *Their Finest Hour: The Battle of Britain Remembered*, by Phillip Kaplan and Richard Collier, at 171 (1989). This gives the bombed's view of the bomber.



HAGUE IX - ARTICLE 2

Military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with his artillery, after a summons followed by a reasonable time of waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within time fixed.

He incurs no responsibility for any unavoidable damage, which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little harm as possible.

From Convention (IX) Concerning Bombardment By Naval Forces in Time of War, Signed at The Hague, Oct. 18, 1907, reprinted in Schindler & Toman, *supra* note 4, at 811.

## 1923 AIR RULES - ARTICLES 22-24

Article 22. Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants is prohibited.

Article 23. Aerial bombardment for the purpose of enforcing compliance with requisitions in kind or payment of contributions in money is prohibited.

Article 24 (1). Aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

Article 24 (2). Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories containing important and well-known centers engaged in the manufacture of arms, ammunition or distinctly military supplies; lines of communications or transportation used for military purposes.

Article 24 (3). The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighborhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

Article 24 (4). In the immediate neighborhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such a bombardment having regard to the danger thus caused to the civilian population.

From Hague Rules of Air Warfare Drafted by a Commission of Jurists at The Hague, Dec. 1922-Feb. 1923, reprinted in Schindler & Toman, *supra* note 4 at 207.

PRIME MINISTER NEVILLE CHAMBERLAIN'S JUNE 21, 1938  
COMMENTS TO THE HOUSE OF COMMONS

In the first place, it is against international law to bomb civilians as such and make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets that are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighborhood is not bombed...We cannot too strongly condemn any declaration on the part of anybody, wherever it may be made and on whatever side it may be made, that it should be part of a deliberate policy to try and win a war by demoralizing the civilian population through a policy of bombing from the air. That is absolutely contrary to international law.

Reprinted in SPAIGHT, *supra* note 69 at 257.



LEAGUE OF NATIONS ACTION OF SEPTEMBER 30, 1938

The Assembly...Recognizes the following principles as a necessary basis for any subsequent regulations: (1) The intentional bombing of civilian populations is illegal. (2) Objectives aimed at from the air must be legitimate military objectives and must be identifiable. (3) Any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighborhood are not bombed through negligence.

This is an excerpt. The entire resolution is reprinted in Schindler & Toman, *supra*, note 4 at 221.

## SIR MALKIN'S RULES

Air bombardment is only legitimate in the following circumstances:

- (1) Against warships, including transports and fleet auxiliaries, at sea;
- (2) On land, in accordance with the following rules:

Any objective on land which may legitimately be bombarded under the rules applicable to land warfare, may be bombarded from the air if it is within the range of medium artillery, which for this purpose

should be taken as ten miles from any of the forces of the belligerent who effects the bombardment or his allies.

In addition, the following objectives on land may be bombarded, provided they are either anywhere on territory occupied by an invader or within a radius of fifty miles of the nearest troops or air forces of the belligerent carrying out the bombardment or of his allies:

- (a) Enemy troops and air forces;
- (b) Ammunition dumps, military supply depots, artillery parks and similar well defined aggregations of distinctly military equipment, stores, or supplies;
- (c) Supply columns and other means of transport which are engaged in transporting supplies to or from the depots etc. mentioned under (b).

A committee chaired by Sir William Malkin wrote these rules. These are quoted in Parks, *supra* note 22, at 43-44.

COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977  
TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 - TARGET LIST

1. armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting;
2. positions, installations or constructions occupied by the forces...as well as combat objectives (that is to say, those objectives contested in battle between land or sea forces, including airborne forces);
3. installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defense, Supply) and other organs for the direction and administration of military operations;
4. stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicles [*sic.*] parks;
5. airfields, rocket launching ramps and naval base installations;
6. those of the lines of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance;
7. the installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance;
8. industries of fundamental importance for the conduct of the war:
  - a. industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
  - b. industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;
  - c. factories or plant constitution other production and manufacturing centers of fundamental importance for the conduct of

war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;

d. storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c).

e. installations providing energy mainly for national defense, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.

9. installations constituting experimental, research centres for experiments on and the development of weapons and war material.

Reprinted in Parks, *supra* note 22, at 138.

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## CUSTOMARY PRACTICE AND US AIR FORCE TARGETING RULES COMPARED

Parks compares "Customary Practice" and Air Force Pamphlet (AFP) 200-17, *An Introduction to Air Force Targeting* (23 June 1989) in allowing the targeting of the following items:

### Customary Practice

Military equipment, units  
and bases

Economic targets

- power sources
- industry
- transportation

Command and Control

### AFP 200-17

Military forces, equipment  
and facilities

Economic targets

- industrial complexes
- production facilities
- transportation

Leadership targets

- government centers (political)
- military headquarters

At Parks, *supra* note 22, at 144.